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Supreme Court of the United States

October Term, 1976
No. 76-1360

EDDIE JACKSON, RONALD GARRETT, FAIRH LEE RIGGS, CHARLES RUDOLPH, and CHARLES CAVANAUGH,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

Page

OPINIONS BELOW 2

JURISDICTION 3

QUESTIONS PRESENTED 4

STATUTES INVOLVED 6

STATEMENT OF THE CASE 9

A. Introduction 9

B. Electronic Surveillance . . 12

1. The wiretap 12

2. Pre-trial suppression motions 12

3. Trial disclosures of government informant . . 14

4. Renewal of suppression motion 17

5. Facial insufficiency of order 19

C. Application of the Pinkerton Rule 20

Page

REASONS FOR GRANTING THE WRIT . . . 22

I. This case raises important issues concerning 18 U.S.C. § 2518(1)(c) 22

II. In failing to require suppression where a wiretap order was insufficient on its face, the court below has misconstrued and rendered meaningless 18 U.S.C. § 2518(10)(a)(ii) 31

III. This case should be remanded for proper determination of petitioners' liability under the substantive counts of the indictment 38

CONCLUSION 42

APPENDIX--

Opinion of the Court of Appeals 1a

Order Denying Petition for Rehearing 52a

Excerpt of Memorandum Opinion and Order Denying Motion to Suppress Wiretap Evidence . . 53a

Excerpt of Memorandum Opinion Denying Defendants' Motion For Rehearing Re: Suppression of Wiretap Evidence 55a

Page

Excerpt of Memorandum Opinion and Order Concerning Trial Issues 58a

Findings and Conclusions Pursuant to Rule 23(c) 63a

Affidavit of Ronald S. Garibotto 89a

TABLE OF AUTHORITIES

Cases:

Aguilar v. Texas, 378 U.S. 108 (1964) . 25

Berger v. New York, 388 U.S. 41 (1967) 24

Glazerman v. United States, 421 F.2d 547 (10th Cir.), cert. denied, 398 U.S. 928 (1970) 40

Levine v. United States, 383 U.S. 265 (1966) 39

Pinkerton v. United States, 328 U.S. 640 (1946) 20,21,22,38, 39,41

United States v. Acon, 513 F.2d 513 (3d Cir. 1975) 34

United States v. Anderson, 542 F.2d 432 (7th Cir. 1976) 29

United States v. Bobo, 477 F.2d 974 (4th Cir. 1973) 29

Page

United States v. Chavez, 416 U.S. 562 (1974) 30,32,35,36,38

United States v. Curreri, 388 F.Supp. 607 (D. Md. 1974) 26

United States v. DiMuro, 540 F.2d 503 (1st Cir. 1976) 29

United States v. Giordano, 416 U.S. 505 (1974) 23,24,30,32,36,37

United States v. Kalustian, 529 F.2d 585 (9th Cir. 1976) 26

United States v. Knippenberg, 502 F.2d 1056 (7th Cir. 1974) 39

United States v. Pellicci, 504 F.2d 1106 (1st Cir. 1974), cert. denied, 419 U.S. 1122 (1975) 34

United States v. Schwartz, 535 F.2d 160 (2d Cir. 1976) 29

United States v. United States District Court, 407 U.S. 297 (1972) 30

United States v. Vento, 535 F.2d 838 (3d Cir. 1976) 29

United States v. Vigi, 515 F.2d 209 (6th Cir.), cert. denied, 432 U.S. 912 (1975) 34,35

Statutes:

18 U.S.C. § 2516(1) 6,13,20,31,34

18 U.S.C. § 2518(1)(a) 6,31

Page

18 U.S.C. § 2518(1)(c) . . 4,7,8,13,14,18,22, 24,25,27,30

18 U.S.C. § 2518(3)(c) 7,23

18 U.S.C. § 2518(4)(d) 7,31,37

18 U.S.C. § 2518(10)(a) 8,35

18 U.S.C. § 2518(10)(a)(i) . 4,8,24,32,33,35,36

18 U.S.C. § 2518(10)(a)(ii) . 5,8,19,31,34,35, 36,37,38

18 U.S.C. § 2518(10)(a)(iii) 8,37

21 U.S.C. § 841 9

21 U.S.C. § 846 9

Other Authorities:

ABA Standards Relating To Electronic Surveillance (Approved Draft 1971) . . 24

Note, Electronic Surveillance, Title III And The Requirement of Necessity, 2 Hastings Const. L.Q. 571 (1975) . .23,24,27

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No.

EDDIE JACKSON, RONALD GARRETT,
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Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The petitioners, Eddie Jackson, Ronald Garrett, Fairh Lee Riggs, Charles Rudolph and Charles Cavanaugh, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 8, 1976.

OPINIONS BELOW[1/]

The opinion of the court of appeals is reported at 544 F.2d 242 and is set forth in the Appendix hereto (Pet. App. 1a).

1/ During the course of this proceeding the district court issued several written opinions on various issues. Included in the Appendix hereto are those portions of opinions believed necessary for consideration of this petition. We will promptly file any additional portions of the record upon request of the Court.

Relevant portions of the opinions of the district court, and its findings and conclusions of law, which are not reported, are set forth in the Appendix hereto (Pet. App. 53a, 55a, 58a, and 63a).

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1976. A timely petition for rehearing, with a suggestion for rehearing en banc, was denied on February 2, 1977 (Pet. App. 52a). On timely application, Mr. Justice Stewart, on February 28, 1977, extended the time for filing this petition to and including April 4, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 2518(1)(c), which requires an application for an order authorizing the interception of wire communications to include a full and complete statement regarding other investigative procedures, is violated where an application erroneously states that normal avenues of investigation are closed, and fails to disclose the availability of significant investigative alternatives.

2. Whether the factual statements in an application for an order authorizing the interception of wire communications may be impeached.

3. Whether a violation of 18 U.S.C. § 2518(1)(c) requires suppression of evidence pursuant to 18 U.S.C. § 2518(10)(a)(i).

4. Whether an order authorizing the interception of wire communications, which states that the individual who authorized the application was an Acting Assistant Attorney General, is insufficient on its face within the meaning of 18 U.S.C. § 2518(10)(a)(ii) so as to require the suppression of evidence obtained pursuant thereto.

5. Whether a co-conspirator can be held criminally liable for substantive offenses committed by other members of the conspiracy before he had joined or after he had withdrawn from the conspiracy.

STATUTES INVOLVED

18 U.S.C. § 2516

> (1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made . . .

18 U.S.C. § 2518

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> > (a) the identity of the investigative or law enforcement officer making the application, and the officer, authorizing the application.

* * * * *

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

* * * * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that --

* * * * *

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

* * * * *

(4) Each order authorizing or approving the interception of any wire or oral communications shall specify --

* * * * *

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application;

* * * * *

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that --

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall

> be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

* * * * *

STATEMENT OF THE CASE

A. Introduction

Petitioners were indicted on January 4, 1972, in the United States District Court for the Eastern District of Michigan. Count One of the 16-count indictment, No. 46597, charged a single conspiracy to manufacture, distribute and possess heroin and cocaine in violation of 21 U.S.C. § 846, and named 17 defendants and 15 unindicted co-conspirators. Counts Two through Sixteen charged each defendant with substantive violations of 21 U.S.C. § 841 in connection with possession of

narcotics. In a companion indictment, No. 46598, the 15 unindicted co-conspirators in indictment No. 46597 were charged with the identical offenses, and the 17 defendants in indictment No. 46597 were named as unindicted co-conspirators.

Following consolidated pre-trial proceedings, jury trials were waived and both indictments were tried simultaneously before two district judges. Each of the petitioners herein was found guilty of conspiracy and 13 of the substantive counts.[2/] Eddie Jackson was sentenced to concurrent fifteen-year terms of imprisonment on ten counts to be served consecutively with concurrent five-year terms of imprisonment on four counts, plus a committed fine of $5,000 on each count and a

---

2/ Of the 32 individuals named in the two indictments, 17 were convicted of multiple counts, 10 were acquitted of all counts, and five were severed prior to trial.

special three-year parole term. Ronald Garrett received concurrent terms of twelve and one half years' imprisonment on each count, with a special parole term of three years and a committed fine of $1,000 on each count. Fairh Lee Riggs received concurrent terms of seven years' imprisonment on each count, with a special parole term of three years. Charles Rudolph was sentenced to ten years' imprisonment on each count, with a special parole term of three years and a committed fine of $1,000 on each count. Charles Cavanaugh was given concurrent terms of seven years' imprisonment on each count, with a special parole term of three years and a committed fine of $1,000 on each count. Each petitioner is presently in custody serving the above-mentioned sentence.

B. Electronic Surveillance

1. The wiretap.

During the investigation preceding the indictments in this case, the government obtained an order in the United States District Court for the Eastern District of Michigan which authorized the interception of wire communications from a telephone located at 19315 Hubbell Street, Detroit, a private house that was the alleged headquarters of a large narcotics conspiracy. The order, authorizing 20 days of interception, was issued on November 11, 1971, and was extended for an additional 15 days on December 1, 1971. Conversations intercepted pursuant to this order were a major portion of the government's evidence at trial.

2. Pre-trial suppression motions.

Prior to trial, petitioners filed

motions to suppress the wiretap evidence on a number of grounds, including, inter alia, (a) the government's failure to obtain prior authorization for the application from the "Attorney General, or any Assistant Attorney General specifically designated by the Attorney General," as prescribed in 18 U.S.C. § 2516(1); and (b) the failure to satisfy the requirement of 18 U.S.C. § 2518(1)(c) that the application contain "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." (Joint App. at 760-773, 849-852, 665-670).[3/]

3/ "Joint App." refers to "Appellants' Joint Appendix on Appeal," consisting of seven separate volumes filed by petitioners in the court below.

As to the latter ground, petitioners contended that the supporting affidavit of Agent Ronald Garibotto,[4/] upon which the application was primarily based, was too general and conclusory, and failed to allege specific facts sufficient to satisfy the "full and complete statement" requirement of § 2518(1)(c). The district court dismissed this contention, finding the Garibotto affidavit sufficient on its face (Pet. App. 53a-57a).

3. Trial disclosures of government informant.

The government's principal inform-

4/ The affidavit of Agent Garibotto is set forth in the Appendix hereto (Pet. App. 89a).

ant during its investigation of petitioners was Roosevelt Nabors. Referred to in the Garibotto affidavit as "S-1," it was Nabors' activities in connection with two undercover narcotics sales which provided the basis of the government's showing of probable cause in the wiretap application. He was also called as a government witness at trial, where he testified extensively concerning his dealings with the so-called "Jackson/Blair" narcotics organization.

While he was being examined by government counsel at trial, Nabors disclosed that during his undercover activities on behalf of the government in November-December, 1971, he was asked by George Blair (allegedly one of four key figures in the narcotics conspiracy), whether he wished to become a "lieutenant" in the Jackson/Blair organization.

Nabors testified that upon reporting this to Agent Garibotto, he was specifically instructed to decline the invitation. Thereafter, pursuant to this directive, Nabors informed Blair that he did not wish to accept the position in the organization. At that point, having declined the offer, Nabors was asked to leave the organization's headquarters because a "lieutenant's meeting" of the major figures in the operation was about to take place (Joint App. at 1178-1183).

The above events, the occurrence of which is not disputed by the government (see Brief for the United States at 54, 80), took place during the same period of the investigation described in the Garibotto affidavit. Yet the affidavit, and particularly paragraphs 19 & 20 thereof dealing with the exhaustion of normal investigative procedures (Pet. App. 102a-104a), makes no mention of this opportunity that

was presented for Nabors ("S-1") to infiltrate the organization at the highest level. No reason is given as to why it was not exploited. The affidavit, submitted just days after the offer to Nabors was turned down, is completely silent as to the entire matter.

4. Renewal of suppression motion.

After these disclosures at trial, petitioners immediately renewed their motion to suppress the wiretap evidence on grounds that Nabors' testimony refuted critical representations that had been made in obtaining the interception order, to wit, that "all normal avenues of investigation are closed" (Pet. App. 104a); that normal investigative procedures were unlikely to succeed in establishing the identity of Jackson's and Blair's confederates or other details of their operation (Pet. App. 102a-

103a); and that there was an inability to "move any further vertically or horizontally in the JACKSON/BLAIR operation" (Pet. App. 103a). Petitioners contended that in light of the actual facts, the Garibotto affidavit was false and misleading, had suppressed highly relevant information, and had therefore clearly failed to satisfy the "full and complete statement" requirement of 18 U.S.C. § 2518(1)(c).

However, the district court denied the motion, stating that the above facts do not "substantially detract" from the Garibotto affidavit, because, in the opinion of the court, "[n]arcotics distribution operations are extremely complex. . . [t]hus it would be unlikely that Nabors could learn the extent of the alleged conspiracy even if he . . . infiltrated the organization. . . ," and that "with his lenghty prior criminal record, Nabor's [sic]

reliability, both during the investigation and as a witness at trial, was marginal at best." (Pet. App. 60a). In addition, the district court held that the Garibotto affidavit was not sufficiently "tainted" so as to justify reconsideration of the issuing judge's finding that normal investigative procedures were unlikely to succeed. (Pet. App. 61a). In affirming, the court of appeals essentially adopted the district court's analysis. (Pet. App. 26a).

5. Facial insufficiency of order.

As to the other ground for suppression, petitioners contended that the interception order was insufficient on its face, requiring suppression of the wiretap evidence pursuant to 18 U.S.C. § 2518(10)(a)(ii), because the order stated that Acting Assistant Attorney General Henry E. Peterson

had approved the application. Since 18 U.S.C. § 2516(1) limits the authorization power to "[t]he Attorney General, or any Assistant Attorney General specifically designated by the Attorney General," petitioners argued that an Acting Assistant Attorney General is not a proper official.

The court below rejected this argument because the district court had found that in spite of what was stated in the application and order, the Attorney General himself had given the approval in this case. (Pet. App. 24a).

C. Application of the Pinkerton Rule

After finding each of the petitioners guilty of the conspiracy count, the district court applied the rule of Pinkerton v. United States, 328 U.S. 640 (1946), and found petitioners guilty of each of

thirteen substantive counts held to have been committed in furtherance of the conspiracy.[5/] (Pet. App. 84a-85a).

In a post-trial memorandum opinion and order, the court described its interpretation of the Pinkerton rule as follows:

> In Pinkerton v. United States, 328 U.S. 640 (1946), the Supreme Court held that each co-conspirator may be held accountable for all substantive offenses committed in furtherance of a conspiracy. Therefore, as applied in the present cases, once a defendant is shown to be a member of the conspiracy, he may be found guilty of not only Count One but also of each substantive offense charged in Counts Two through Sixteen which were committed in furtherance of the conspiracy.

(Joint App. at 125).

Petitioners argued that Pinkerton

5/ Petitioner Eddie Jackson was also found guilty of counts three, four, thirteen, fourteen, fifteen and sixteen as a principal. (Pet. App. 86a-87a).

had been misapplied because the district court failed to consider the period each defendant was a member of the conspiracy in relation to the time a particular substantive offense was committed. The court below did not address this argument, saying only that it was "constitutionally required to follow the Supreme Court's decision in Pinkerton." (Pet. App. 39a).

REASONS FOR GRANTING THE WRIT

I.

THIS CASE RAISES IMPORTANT ISSUES CONCERNING 18 U.S.C. § 2518(1)(c)

As a precondition to the use of electronic surveillance, Congress provided, in 18 U.S.C. § 2518(1)(c), that an application for an interception order must include:

> a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous; . . .

In turn, the judge to whom the application is submitted must determine, prior to issuing an interception order, that:

> normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried to be too dangerous; . . .

18 U.S.C. § 2518(3)(c). See United States v. Giordano, 416 U.S. 505, 515 (1974); Note, Electronic Surveillance, Title III, And The Requirement of Necessity, 2 Hastings Const. L.Q. 571 (1975).

The issue raised in this petition is whether the application upon which the government obtained a wiretap order in this case satisfied this requirement.

Petitioners contend that it did not, and that accordingly, the evidence obtained as a result of the wiretap should have been suppressed pursuant to 18 U.S.C. § 2518(10)(a)(i).[6/]

Petitioners argued in the courts below, and still maintain, that the application here, based upon the affidavit of Special Agent Ronald S. Garibotto (Pet. App. 89a), does not on its face satisfy

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6/ There is no question here of standing, at least as to petitioners Jackson, Garrett, Cavanaugh and Rudolph (see Brief for United States at 42 n.24). Nor do we believe it can seriously be argued that the § 2518(1)(c) requirement does not "directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary device," United States v. Giordano, supra, at 527, so as to require the sanction of suppression. Indeed, § 2518(1)(c) has strong Fourth Amendment underpinnings. See Berger v. New York, 388 U.S. 41, 60 (1967); ABA Standards Relating to Electronic Surveillance at 139-140 (Approved Draft 1971); Note, Electronic Surveillance, Title III, And The Requirement of Necessity, supra, at 577-586.

the requirements of § 2518(1)(c). The relevant paragraphs (19 & 20) consist primarily of general statements about the agent's experience with narcotics conspiracies, and his conclusions concerning the likely course of the investigation. By failing to present sufficient details concerning this case, he deprived the issuing judge of the facts necessary to arrive at a neutral and detached determination of the necessity for electronic surveillance. Cf. Aguilar v. Texas, 378 U.S. 108 (1964).

Moreover, the practice of permitting interception applications to be based upon the general nature of the criminal activity being investigated, rather than the facts of the particular case, virtually guarantees approval of the application for certain categories of crime (e.g., gambling and narcotics). Certainly this was

not the Congressional intent in enacting Title III. See United States v. Kalustian, 529 F.2d 585, 589 (9th Cir. 1976) (affidavit held insufficient where it contained mere conclusions and failed to set forth facts adequately showing why traditional investigating techniques of alleged gambling activities were not sufficient); United States v. Curreri, 388 F.Supp. 607, 622) (D. Md. 1974) (affidavit which failed to state reasons why investigative techniques other than wiretaps were not considered likely to succeed held not sufficient to warrant issuance of wiretap order). As one student of the subject has observed (prior to the above decisions):

> [The] lack of explanation of the necessity requirement has permitted courts to interpret its meaning with few restrictions and has led to the virtual "reading out" of the requirement from Title III. Research has revealed no case holding that the showing of necessity required by Title III has

> not been met in an application for an interception order. Boilerplate allegations of necessity are frequently accepted as sufficient showings. Judicial opinions dealing with the necessity issue usually have treated the requirement and the factual situation in which the application arises in a cursory manner, simply finding that the requirement has been met.

Note, Electronic Surveillance, Title III, And The Requirement of Necessity, supra, at 573 (footnotes citing cases omitted).

But here, even if the Garibotto affidavit had been adequate on its face, subsequent disclosures made at trial contradicted its principal averments dealing with normal investigative procedures, and made it quite apparent that Agent Garibotto had withheld extremely relevant information from the application (see pp. 13-17, supra). This certainly cannot be the "full and complete statement" that Congress found essential when it enacted § 2518(1)(c).

However, the court below found no error because it agreed with the district court that "even as a lieutenant, Nabors would have had difficulty in learning all the complex details of the widespread organization," and "in view of Nabors' lengthy prior criminal record, the government would have had great difficulty in establishing criminal liability by his testimony alone" (Pet. App. 26a).

Perhaps Judge Kennedy (the issuing judge), had she been made aware of all of the facts, would have taken a similar position, and found an adequate necessity for the interception notwithstanding the opportunity for further investigation through the use of Nabors.[7/] But the

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7/ And perhaps not. The facts withheld from Judge Kennedy indicated that Nabors

[cont'd next page]

critical point, which the court below apparently failed to consider, is that Judge Kennedy was not presented with these

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7/ [cont'd] had gained the confidence of the most important members of the so-called Jackson/Blair narcotics organization. It was Blair himself who invited Nabors to become a "lieutenant." In addition, there was no indication that Nabors, whom the government's application described as having provided "consistently reliable and valuable information" (Pet. App. 92a), was unwilling to testify. (Nabors did in fact testify, both before the grand jury and at trial). These are both factors which have been considered significant in determining the potential for success of normal investigative procedures. Compare United States v. DiMuro, 540 F.2d 503 (1st Cir. 1976) (informants unwilling to testify); United States v. Schwartz, 535 F.2d 160 (2d Cir. 1976) (informant not taken into confidence of conspirators and unwilling to testify); United States v. Vento, 535 F.2d 838 (3rd Cir. 1976) (informants unwilling to testify); United States v. Bobo, 477 F.2d 974 (4th Cir. 1973) (informants refused to testify). United States v. Anderson, 542 F.2d 432 (7th Cir. 1976) (informants would not testify).

facts. That is the defect here, and speculation as to what action the issuing judge might have taken had she been properly advised is simply besides the point.

This Court has made it clear that "strict adherence by the Government to the provisions of Title III" is required. United States v. Chavez, 416 U.S. 562, 580 (1974). Also see United States v. Giordano, 416 U.S. 505 (1974); United States v. United States District Court, 407 U.S. 297 (1972). Here the government failed to comply with 18 U.S.C. § 2518(1)(c) because its wiretap application did not include a full and complete statement concerning the further investigative procedures that were available through continued use of its informant, and the reasons, if any, these procedures appeared unlikely to succeed.

The court below has misconstrued an

important federal statute which is in need of definitive interpretation by this Court.

II.

IN FAILING TO REQUIRE SUPPRESSION WHERE A WIRETAP ORDER WAS INSUFFICIENT ON ITS FACE, THE COURT BELOW HAS MISCONSTRUED AND RENDERED MEANINGLESS 18 U.S.C. § 2518(10)(a)(ii)

Pursuant to 18 U.S.C. §2516(1), an application for a wiretap order may be authorized by "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General . . . ." It is further provided that the officer authorizing the application must be identified in both the application and the ensuing court order. 18 U.S.C. § 2518(1)(a), (4)(d).

In United States v. Giordano, 416 U.S. 505 (1974), this Court held that where a wiretap application and order indicated that approval had been given by an Assistant Attorney General, when in fact the application had been approved by the Attorney General's Executive Assistant, the evidence obtained pursuant to the order had to be suppressed because the communications were "unlawfully intercepted" within the meaning of 18 U.S.C. 2518(10)(a)(i).

In United States v. Chavez, 416 U.S. 562 (1974), the wiretap application and order also misidentified the authorizing official. They indicated that authorization had been given by Assistant Attorney General Will Wilson, when in fact it was the Attorney General himself who had given the approval. Distinguishing United States v. Giordano, supra, the Court held that mere misidentification of the

authorizing official on the application and order, when authorization has in fact been made by the Attorney General, does not render interceptions conducted under the order "unlawful" within the meaning of § 2518(10)(a)(i). 416 U.S. at 579.

In the present case the application and order indicated that approval had been given by Acting[8/] Assistant Attorney General Henry Peterson. It was later revealed, however, that Mr. Peterson had not approved the application, and following proceedings on this issue, the district court found that approval had been made by Attorney

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8/ Henry Peterson became an Acting Assistant Attorney General on October 15, 1971, upon the resignation of Will Wilson. He was appointed by President Nixon and confirmed by the Senate on February 14, 1972 (Joint App. at 736).

General Mitchell himself.

Petitioners contend that an "Acting" Assistant Attorney General is not empowered under § 2516(1) to authorize a wiretap application.[9/] They argue therefore, that regardless of who actually approved the application, the order was "insufficient on its face" and the wiretap evidence was subject to suppression under § 2518(10)(a)(ii).

The court below rejected this contention on the basis of its prior decision in United States v. Vigi, 515 F.2d 290(6th Cir.), cert. denied, 432 U.S. 912 (1975),

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9/ It was so held in United States v. Acon, 513 F.2d 513 (3rd Cir. 1975). Contra, United States v. Pellicci, 504 F.2d 1106 (1st Cir. 1974), cert. denied, 419 U.S. 1122 (1975).

which involved the same circumstances. In Vigi, the court held that United States v. Chavez, supra, was controlling, and without reaching the question of the authority of an Acting Assistant Attorney General to approve a wiretap application, found that none of the grounds set forth in § 2518(10)(a) required suppression because the Attorney General had actually given approval.

However, in Chavez this Court clearly distinguished suppression under paragraph (10)(a)(i) from paragraph (10)(a)(ii). With regard to (10)(a)(i) the Court held (416 U.S. at 579):

> When it is clearly established . . . that authorization . . . has been given by the Attorney General himself, but the application, and, as a result, the interception order, incorrectly state that approval has instead been given by a specially designated Assistant Attorney General, the misidentification, by itself, will not render interceptions conducted under the order

> "unlawful" within the meaning of § 2518(10)(a)(i) . . . .

The Court had previously noted, with respect to (10)(a)(ii), that:

> Here, the interception order clearly identified "on its face" Assistant Attorney General Wilson as the person who authorized the application to be made. Under § 2516(1), he properly could give such approval had he been specially designated to do so by the Attorney General, as the order recited. That this has subsequently been shown to be incorrect does not detract from the facial sufficiency of the order.

416 U.S. at 573-574 (footnote omitted). Also see United States v. Giordano, supra, at 525 n.14.

In United States v. Giordano, supra, the Court held that the words "unlawfully intercepted" in paragraph (10)(a)(i) are not limited to constitutional violations, but apply to those failures to satisfy the statutory requirements of Title III "that

directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." 416 U.S. at 527. As a necessary corollary, paragraphs (10)(a)(ii) and (10)(a)(iii) must be deemed to require suppression for less substantial violations that do not render the interceptions "unlawful." See 416 U.S. at 526-527.

Petitioners contend that where an interception order fails to correctly specify the identity of the person authorizing the application, as expressly required by § 2518(4)(d), and names instead an individual who, as a matter of law, lacks the capacity to authorize the application, such an order is insufficient on its face. Under the plain meaning of § 2518(10)(a)

(ii), evidence obtained pursuant to such an order is to be suppressed, regardless of whether the interception procedure is otherwise lawful. In failing to reach this conclusion, the court below misread this Court's decision in United States v. Chavez, supra, and rendered § 2518(10)(a)(ii) meaningless. Review is necessary to correct this error.

III.

THIS CASE SHOULD BE REMANDED FOR PROPER DETERMINATION OF PETITIONERS' LIABILITY UNDER THE SUBSTANTIVE COUNTS OF THE INDICTMENT

Applying the rule of Pinkerton v. United States, 328 U.S. 640 (1946), the district court found each of the petitioners guilty of 13 substantive counts (Pet. App. 84a-85a). In a post-trial memorandum

opinion and order, the court indicated that under Pinkerton, "once a defendant is shown to be a member of the conspiracy, he may be found guilty of not only Count One but also of each substantive offense charged in Counts Two through Sixteen which were committed in furtherance of the conspiracy." (Joint App. at 125).

The above statement omits an essential element of criminal liability under the Pinkerton doctrine, namely, that the particular defendant was a member of the conspiracy at the time the substantive offense was committed.[10/] See Levine v. United States, 383 U.S. 265 (1966); United States v. Knippenberg, 502 F.2d 1056 (7th

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10/ Thus a defendant's criminal liability under Pinkerton for substantive offenses committed in furtherance of a conspiracy is to be distinguished from his liability for the conspiracy itself, where it is frequently held that he is responsible for acts committed by co-conspirators prior and subsequent to his joinder.

Cir. 1974); Glazerman v. United States, 421 F.2d 547 (10th Cir.), cert. denied, 398 U.S. 928 (1970).

Here the period of the conspiracy, as alleged in Count One of the indictment, was from September 26 to December 15, 1971. The substantive offenses were alleged to have occurred on October 18 (Count Two), October 22 (Count Three), November 4 (Count Four), November 8 (Count Five) and December 15 (Counts Six through Sixteen) of 1971. While the district court found each petitioner guilty of Count One, and held that all substantive offenses except Counts Two and Five were committed in furtherance of the conspiracy, there were no findings as to when each of the petitioners joined the conspiracy, or whether there had been withdrawl therefrom.11/

11/ Withdrawl is particularly relevant as to petitioner Riggs, who was arrested in

[cont'd next page]

In view of the district court's misinterpretation of the law and failure to make proper findings, as well as the nature of the government's proof with regard to petitioners Garrett, Riggs, Rudolph and Cavanaugh,12/ the validity of their convictions for the substantive offenses is highly questionable.

The court below failed to address this issue, except to note that it was bound by this Court's decision in Pinkerton (Pet. App. 39a), a point with which we obviously do not quarrel.

Because Pinkerton was misapplied,

11/[cont'd] New York on September 26, 1971, and remained in federal custody until November 22, 1971. All of the substantive offenses charged in the indictment occurred during or subsequent to this period.

12/ These petitioners, none of whom directly participated in any of the substantive offenses, vigorously contended in the court below that the evidence was insufficient to support their conviction of conspiracy.

this case should be remanded for proper determination of liability for the substantive offenses.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY ROTHBLATT

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JON G. ROTHBLATT
Of Counsel

April 1977

Nos. 74-2337-53

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CARA WOODS, JR., WILLIE LEE KILPATRICK, JOSEPH LEON WEAVER, JAMES REGINALD WEAVER, EDDIE JACKSON, COURTNEY BROWN, HERBERT BELL, RONALD GARRETT, SAMUEL HORNE, ALPHONZO JONES, FAIRH LEE RIGGS, CHARLES RUDOLPH, LATICIA BURNS, MAURICE THOMPSON, LEO HURT, GEORGE BLAIR, CHARLES CAVANAUGH,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed October 8, 1976.

Before: CELEBREZZE, McCREE, and MILLER,* Circuit Judges.

McCREE, Circuit Judge. We have consolidated for consideration the appeals of seventeen defendants from their convictions in the Eastern District of Michigan. Each appellant had been charged in one of two similarly worded indictments

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* The Honorable William E. Miller died on April 12, 1976 and did not participate in this opinion.

with sixteen violations of federal narcotics laws, 21 U.S.C. §§ 841 and 846. One indictment, hereinafter the Jackson indictment, named fifteen unindicted co-conspirators and seventeen defendants, including appellants Eddie Jackson, Herbert Bell, Ronald Garrett, Samuel Horne, Alphonzo Jones, Fairh Lee Riggs, Charles Rudolph, Charles Cavanaugh, Laticia Burns, Maurice Thompson, Leo Hurt, George Blair, and Courtney Brown. The other indictment, hereinafter the Kilpatrick indictment, named as defendants the fifteen persons who were unindicted co-conspirators in the earlier indictment, including appellants Willie Kilpatrick, Joseph Weaver, James Weaver, and Cara Woods. The persons named as defendants in the first indictment were named as unindicted co-conspirators in the second indictment. Count 1 of both indictments charged a single conspiracy that continued from September to December 1971 to manufacture, distribute, and possess heroin and cocaine in violation of 21 U.S.C. § 846. Counts 2 through 16 charged substantive violations of 21 U.S.C. § 841 committed during the period from October to December 1971.

One of these cases was assigned to District Judge John Feikens for trial, and the other to District Judge Philip Pratt, both of whom are Judges of the Eastern District of Michigan. Consolidated pretrial evidentiary hearings were held to consider various motions raised by appellants. In addition to waiving their right to trial by jury, the various defendants also agreed to proceed with a simultaneous bench trial before Judges Feikens and Pratt in order to avoid the necessity of two separate trials involving identical proofs.

Although the proceedings in the two separate cases were conducted simultaneously, each judge was solely responsible for all rulings affecting each defendant in the case assigned to him, and each judge entered separate findings and conclusions regarding the guilt or innocence of each defendant in the case assigned to him.

At the conclusion of their joint bench trial, all appellants were found guilty on multiple counts and received sentences

ranging from three years' imprisonment to twenty years' imprisonment.[1] Appellants Kilpatrick, James Weaver, Joseph Weaver, Jackson, Brown, Blair, Bell, Riggs, Garrett, Horne, Jones, Rudolph, Cavanaugh, and Hurt were convicted on counts 1, 3, 4, and 6 through 16. Cara Woods was convicted on counts 8 and 9. And appellants Burns and Thompson were convicted on counts 2 and 5.

The simultaneous trial conducted in the district court was an understandable effort to accommodate indictments of the magnitude and complexity that were obtained here by the government. Nevertheless, this procedure has produced an appellate record of extraordinary size with the consequence that oral argument has been of less than usual assistance to us in analyzing and deciding the issues presented on appeal.

Instead of beginning our opinion with a narration of the facts, we shall consider the facts giving rise to each separate appellate issue in our discussion of it.

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[1] The following appellants were convicted and sentenced by Judge Pratt: Willie Lee Kilpatrick was convicted on counts 1, 3, 4, 6 through 16, and sentenced to concurrent terms of six years' imprisonment on each count, subject to the parole provisions of 18 U.S.C. § 4208(a)(2), with a special parole term of three years. In addition, the court imposed a $2,000 committed fine on count 1. James Reginald Weaver and Joseph Leon Weaver were convicted on counts 1, 3, 4, 6 through 16, and sentenced to concurrent terms of four years' imprisonment on each count, subject to the parole provisions of 18 U.S.C. § 4208(a)(2), with a special parole term of three years. Cara Woods, Jr. was convicted on counts 8 and 9, and sentenced to concurrent terms of six years' imprisonment on each count under the parole provisions of 18 U.S.C. § 4208(a)(2), with a special parole term of three years. The court also imposed a $1,000 committed fine on each count.

The remaining appellants were convicted and sentenced by Judge Feikens. Appellants Jackson, Brown, Blair, Bell, Riggs, Garrett, Horne, Jones, Rudolph, Cavanaugh, and Hurt were convicted on counts 1, 3, 4, 6 through 16, and received the following sentences. Eddie Jackson was sentenced to concurrent fifteen-year terms of imprisonment on counts 1, 3, 4, 6, 7, 8, 9, 10, 11, and 12, to be served consecutively with concurrent five-year terms of imprisonment imposed on each of counts 13 through 16, and a special three-year parole term. A committed fine of $5,000 on each count was also imposed. George Blair and Courtney Brown were sentenced to concurrent terms of fifteen years' imprisonment on each of counts 1, 3, 4, 6, 7, 8, 9, 10, 11, and 12, to be served consecutively with concurrent terms of 2½ years' imprisonment on each of counts 13 through 16, with a special three-year term of parole, and a committed fine of $5,000 on each

I. WERE DEFENDANTS PROPERLY INDICTED?

Appellants[2] challenge the validity of the indictments on several grounds. First, they contend that the grand jury was improperly selected. Second, they contend that the information intercepted by the wiretaps was placed before the grand jury before the government complied with 18 U.S.C. § 2518 (10)(a). Third, they argue that the government misused the grand jury to intimidate persons whom the government intended to call later as witnesses in appellants' criminal trials. Finally, appellants urge that the indictments were multiplicitous.

A. The Selection of the Grand Jury.

Appellants argue that the selection of the grand jury venire violated the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.*, as well as the selection plan adopted in the

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count. Ronald Garrett received concurrent terms of 12½ years' imprisonment on each count, with a special parole term of three years and a committed fine of $3,000 on each count. Charles Rudolph and Herbert Bell received concurrent terms of ten years' imprisonment on each count, with a special parole term of three years, and a committed fine of $1,000 on each count. Samuel Eugene Horne, Alphonzo Jones, Charles Cavanaugh, and Leo Hurt were given concurrent terms of seven years' imprisonment on each count, with a special parole term of three years, and committed fines of $1,000 on each count. Fairh Lee Riggs was sentenced to concurrent terms of seven years' imprisonment on each count, with a special parole term of three years, both to be served concurrently with a sentence imposed by the district court for the Eastern District of New York, which Riggs was then serving.

Appellants Thompson and Burns were convicted on counts 2 and 5, and were sentenced as follows: Maurice Thompson received concurrent terms of five years' imprisonment on each count, with a special parole term of three years' imprisonment to be served at a federal facility with a drug abuse program. Laticia Burns received concurrent terms of three years' imprisonment on each count to be served at a federal facility having a drug abuse program, to be followed by a special three-year parole term.

[2] A number of separate briefs were filed on appeal. Unless otherwise noted, we will treat each argument as applicable to all appellants.

Eastern District of Michigan because an improper voting list was used, an unauthorized person took part in the compilation of the master jury wheel, and a jury clerk took official work out of the office to her home.

We decided these identical issues in *United States* v. *McNeal*, 490 F.2d 206 (6th Cir. 1973), *cert. denied*, 419 U.S. 1020 (1974). At the district court level, the parties in *McNeal* stipulated that precisely the same challenges to the grand jury venire had already been submitted to Judge Feikens and to Judge Pratt in the Kilpatrick and Jackson cases. The parties in *McNeal* agreed to be bound at the district court level by the rulings of Judge Pratt and Judge Feikens, and in accordance with their rulings, the district court denied the motion to quash the indictment in *McNeal*. On review we held that "there was no 'substantial failure to comply with the provisions' of the Act." 490 F.2d 207. We hold that our determination in *McNeal* is dispositive of these appeals as well, since not only the same issues but also the same facts giving rise to them are before us again.

B. The Presentation of Wire Interception Evidence Before the Grand Jury.

Immediately after their arrest, several appellants filed a motion to suppress the wiretap evidence that they believed might have formed a basis for their arrests. They also sought disclosure of the applications and orders for the interceptions. In addition, they moved to enjoin the government from holding a preliminary hearing or presenting the wiretap evidence to a grand jury until ten days after obtaining the disclosure they sought. The government opposed the motions, but neither admitted nor denied the legality of the wire interceptions. After hearing oral arguments, the district court held that the government could not present wire interception evidence at a preliminary hearing without disclosure, but otherwise the district court denied the motions.

On the day scheduled for the preliminary hearing, appellants were indicted by the grand jury, which heard the testimony of Special Agent Garibotto and evidence from the wire interceptions. The return of the indictments made it unnecessary to conduct the preliminary hearing.

Appellants contend that this procedure violated 18 U.S.C. § 2518(9) and (10)(a) and 18 U.S.C. § 3504. Section 2518 (9) provides that:

> The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

Section 2518(10)(a) provides:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

Finally, § 3504 states:

> (a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—
>
> > (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act . . . .

Appellants contend that these sections authorized their motions to suppress, required the government to affirm or deny the legality of the wire interceptions, and prohibited the government from relying on the evidence gathered as a result of the interceptions until these requirements were satisfied. Accordingly, they contend that their indictments must be quashed because the government presented this evidence to the grand jury before it replied to their challenge to the interceptions. 18 U.S.C. § 2515 provides that no intercepted wire communication or evidence derived therefrom may be "received into evidence . . . in any . . . proceeding or before any . . . grand jury . . . if the disclosure of that information would be in violation of this chapter."

We hold that the government was not required to comply with § 2518(9) or to affirm or deny the illegality of the interception before it could introduce the intercepted communications before the grand jury, nor were appellants entitled to prevent the presentation of this evidence to the grand jury even if the interception were unlawful.

The legislative history of § 2518(9) demonstrates that Congress did not intend the ten-day disclosure requirement to apply to grand jury proceedings. The Senate Report section-by-section analysis provides that:

> "Proceeding" is intended to include all adversary type hearings. It would include a trial itself, a probation

> revocation proceeding, or a hearing on a motion for reduction of sentence. *It would not include a grand jury hearing.* Compare *Blue* v. *United States*, 86 S. Ct. 1416, 384 U.S. 251 (1966).

U.S. Code Cong. & Admin. News 2195 (1968).

The Congressional history of § 2518(10)(a) demonstrates that this section was not intended to permit a defendant to challenge the evidence presented to the grand jury:

> Paragraph (10)(a) . . . . must be read in connection with sections 2515 and 2517, discussed above, which it limits. It provides the remedy for the right created by section 2515. *Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual.* (*Blue* v. *United States*, 86 S.Ct. 1416, 384 U.S. 251 [1966].) *There is no intent to change this general rule.* It is the intent of the provision only that when a motion to suppress is granted in another context, its scope may include use in a future grand jury proceeding.

U.S. Code Cong. & Admin. News 2195 (1968). [Emphasis added.]

The Supreme Court's opinion in *Gelbard* v. *United States*, 408 U.S. 41 (1972) analyzes §§ 2518(10)(a) and 3504, and supports the conclusion that they do not authorize a defendant to suppress evidence before the grand jury on the grounds that it was intercepted illegally. Nor is the government required to affirm or deny the legality of the interception. In *Gelbard* the Court held that a grand jury witness could refuse to answer questions that were based upon illegal interceptions, and could defend against a contempt charge under 18 U.S.C. § 2515. Section 2515 bars the use as evidence before official bodies of the contents and the fruits of

illegal interceptions. The Court held that in the context of § 3504, which states the procedures by which aggrieved persons may challenge illegally procured evidence, a "party aggrieved"

> *can only be a witness*, for there is no other "party" to a grand jury proceeding. Moreover, a "claim . . . that evidence is inadmissible" can only be a claim that the witness' potential testimony is inadmissible.

408 U.S. 54. [Emphasis added.]

The Supreme Court drew a careful distinction between a *witness* before the grand jury, who it held may refuse to answer questions based upon illegal interceptions, and a defendant or potential defendant. The Court held that:

> The congressional concern with the applicability of § 2518(10)(a) in grand jury proceedings, so far as it is discernible from the Senate report, was apparently that defendants and potential defendants might be able to utilize suppression motions to impede the issuance of indictments: "Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual. [*United States* v. *Blue*, 384 U. S. 251 (1966).] There is no intent to change this general rule." S. Rep. No. 1097, 90th Cong., 2d Sess., 106 (1968). The "general rule," as illustrated in *Blue*, is that a defendant is not entitled to have his indictment dismissed before trial simply because the Government "acquire[d] incriminating evidence in violation of the [law]," even if the "tainted evidence was presented to the grand jury." 384 U. S., at 255 and n. 3; see *Lawn* v. *United States*, 355 U. S. 339 (1958); *Costello* v. *United States*, 350 U. S. 359 (1956). But that rule has nothing whatever to do with the situation of a grand jury witness who has refused to testify and attempts to defend a subsequent charge of contempt.

408 U.S. 59-60.

Accordingly, we hold that appellants were not entitled to contest the legality of the intercepted communications before the communications were submitted to the grand jury. Appellants contend, however, that they had a right to contest the admissibility of wiretap evidence at the scheduled preliminary hearing, and that the government could not deprive them of this right by the sudden tactic of obtaining an indictment.

Our court has repeatedly held that if "a grand jury returns a true bill prior to the time a preliminary hearing is held, the whole purpose and justification of the preliminary hearing has been satisfied." *United States* v. *Mulligan*, 520 F.2d 1327, 1329 (6th Cir. 1975). A defendant has no right to have a preliminary hearing if a grand jury indictment is returned. Although we have recognized that a preliminary hearing may as a practical matter provide a defendant with an irreplaceable opportunity for discovery, a defendant has no absolute right to these ancillary benefits. For example, in *Mulligan* we held that defendants, who wanted to cross-examine a key government witness prior to trial, suffered no prejudice when their preliminary hearing was continued to permit the government to obtain a grand jury indictment in the interim. Accordingly, we hold that appellants suffered no *legal* prejudice when the government proceeded by indictment, rather than by a preliminary hearing at which appellants could have contested the legality of the wire interceptions pursuant to 18 U.S.C. §§ 2518(10)(a) and 3504.

C. Improper Use of the Grand Jury.

Appellants also assert that the government improperly used the grand jury to discover and preserve evidence to be used at the trial of their already pending indictments. They assert that both Burt and Nabors were called before the grand jury to testify against appellants *after* appellants' indictment. The government concedes that it is improper to use a grand jury solely to prepare a pending indictment for trial. *Beverly* v.

United States, 468 F.2d 732 (5th Cir. 1972); 8 Moore's Federal Practice ¶ 6.04. But it contends that the record contains no support for appellants' claim that Burt and Nabors were called only to prepare pending indictments for trial. Additionally, the government urges that appellants have not demonstrated that any prejudice resulted from the alleged misconduct, and it contends that only Nabors and Burt have standing to raise the issue.

A presumption of regularity attaches to a grand jury's proceedings and appellants have the burden of demonstrating that an irregularity occurred. *Universal Manufacturing Co.* v. *United States*, 508 F.2d 684 (8th Cir. 1975); *Beverly* v. *United States*, 468 F.2d 732 (5th Cir. 1972). Moreover, we agree with the observation made by the First Circuit that:

> grand jury proceedings cannot be policed in any detail. It is a price we pay for grand jury independence that sometimes people are indicted on the basis of evidence tainted in part by hearsay, Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), or of illegally obtained evidence, Lawn v. United States, 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958). Nor is a grand jury narrowly confined in its objectives, Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906), Blair v. United States, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed. 979 (1919).

United States v. *Doe*, 455 F.2d 1270, 1274 (1st Cir. 1972).[3] Accordingly, in *United States* v. *George*, 444 F.2d 310, 314

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[3] The court also recognized, however:

> On the other hand, we are sensitive to the possibilities of abuse of the grand jury process which are inherent in the present situation. As Moore has observed, "The government has at its disposal one of the most effective discovery mechanisms yet devised—the grand jury. This body may call witnesses under compulsory process and examine them in secret under oath, unhampered by the rules of evidence or an adversary counsel's cross-examination, or in the case of a 'prospective defendant' by Fifth Amendment immunity. [citations omitted]." 8 Moore's Federal Practice ¶ 16.08[1], at 16-100 (2d ed. 1970). 455 F.2d at 1275.

(6th Cir. 1971) we held that "[s]o long as it is not the sole or dominant purpose of the grand jury to discover facts relating to [a defendant's] pending indictment, the Court may not interfere with the grand jury's investigation."

Neither appellants nor the government have cited to us any portion of the record in which appellants presented this claim to the district court, and we have searched the voluminous record to no avail. However, assuming that this issue is properly before us, we hold that appellants have presented nothing beyond their own unproved suspicions to prove that Burt and Nabors were improperly summoned before the grand jury for the sole or dominant purpose of preparing the pending indictments for trial. Portions of the testimony at trial suggest that after appellants were indicted, Burt and Nabors did testify before the grand jury regarding some of the matters at issue in appellants' trial. However, appellants have made no showing that Burt and Nabors were not called in order to determine whether other persons not yet indicted were also involved in the conspiracy under investigation. The indictments charged that appellants conspired with "divers other persons whose names are to the Grand Jury unknown," and the grand jury could properly call witnesses in an attempt to identify these persons. *United States* v. *Beverly, supra.*

D. Multiplicity.

Appellants allege that they were improperly indicted and convicted of five separate acts of possession with intent to distribute a controlled substance,[4] when the proofs showed

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[4] The counts charged:

Count 12 — 659.66 grams of cocaine hydrochloride, with a strength of 15.8%.

Count 13 — 681.80 grams of heroin hydrochloride with a strength of 19.3%.

Count 14 — 45.30 grams of cocaine hydrochloride with a strength of 5.1%.

Count 15 — 14.66 grams of cocaine hydrochloride with a strength of 32.7%.

Count 16 — 2,589.93 grams of heroin hydrochloride with a strength of 58.1%.

that all the narcotics in question were found at the Hubbell Street house, and that the intercepted wire communications indicated that appellants had just received a *single* shipment. Accordingly, appellants contend that the fragmentation into multiple counts of a single act of possession of narcotics violated their right to due process.

Apparently appellants raise this contention for the first time on appeal. The government contends that under F. R. Crim.P. 12(b)(2) appellants' failure to make the claim that the indictment was multiplicitous by pretrial motion constituted a waiver of this objection. F.R.Crim.P. 12(b)(2) requires that "[d]efenses and objections based on defects . . . in the indictment or information" "*must* be raised" prior to trial. (Emphasis added.) However, F.R.Crim.P. 12(f) also provides that the "[f]ailure by a party to raise defenses or objections or to make requests which must be made prior to trial . . . shall constitute waiver thereof, *but the court for cause shown may grant relief from the waiver.*" (Emphasis added.)

Since it is not entirely clear from the general averments in the indictments that the narcotics referred to in counts 12 through 16 were all seized from the Hubbell Street house, there may have been good cause for appellants' failure to have raised this issue before the district court until the government presented its case. However, since appellants failed to present this objection to the district court even after the close of the government's case, when the factual basis of their objection was apparent, we hold that they waived this objection under F.R. Crim. P. 12(f).

Appellants also argue that counts 6 and 10 and counts 7 and 11 are multiplicitous, because they charge both distribution and possession with intent to distribute the same quantities of drugs. They urge that possession with intent to distribute is a lesser offense included within distribution. Again, it appears that appellants did not raise this contention before the trial court, and we hold, accordingly, that it was waived F.R. Crim. P. 12(f).

II. WAS THERE GOVERNMENT MISCONDUCT THAT REQUIRES REVERSAL?

Appellants contend that shocking governmental misconduct requires the reversal of their convictions. They contend first that a sham defendant was indicted in order to penetrate their defense. Second, they argue that before their trial, the government improperly disclosed critical information to the press. Third, they complain that the government improperly intruded into the marital relationship of appellant Blair and Ruth Ann Burt, to induce her to testify against appellants. Finally, they argue that the government improperly met with Burt and Blair without any notice to Blair's attorney.

A. The Sham Defendant.

Appellants contend that the government's misconduct in indicting Roosevelt Nabors as a "sham defendant" requires the reversal of their convictions. They contend that the sham nature of the indictment of Nabors, who served as a government informer, is shown by the fact that payments to him continued even after the indictment. Further, he was called to testify before the grand jury about the case in which he was charged after he had been indicted, and defense counsel Milton Henry, who had filed an appearance on behalf of Nabors as well as most of the other defendants, was not notified. Appellants argue that the sham indictment of Nabors violated the fundamental fairness guaranteed by the due process clause, and violated their right to counsel by introducing a government agent into the defense.

Nabors testified that when he first began working with the Bureau of Narcotics and Dangerous Drugs, (BNDD), he was told that his cooperation would be communicated to the court in connection with charges pending against him for attempted murder and the unlawful driving away of an automobile. He also stated that no other promises had been made to him. He stated that while he was working with the BNDD he was

paid approximately $1,500 for living expenses. He testified that he was expected to help to set up arrangements so that government special agents could make purchases directly from members of the Jackson organization. He was not authorized by them to make purchases on his own. Nevertheless, he testified that without the knowledge or authorization of the government, he sold $600 worth of heroin that he had received from the Jackson organization on consignment. He said that when he was arrested, he was told that he was being prosecuted because of this independent transaction.

Agent Garibotto testified that during a review of tape recordings of the intercepted communications after the December 15 arrests at Hubbell Street, government agents discovered that, without government authority, Nabors had called and arranged to pick up at least one quantity of heroin, and that he had sold it. Garibotto testified that Nabors was indicted in good faith for this unauthorized part in the conspiracy. Although he had been severed from the other defendants before trial, Garibotto testified that the government retained the right to try him separately, and that at the time of the trial of the other defendants, no final decision had been made whether he would be brought to trial or not. He said that he planned to make no recommendations one way or the other. He stated that he had authorized a payment to Nabors after his testimony before the grand jury so that Nabors could stay out of sight in a motel. He said that after the indictment he had not used Nabors again as an informant, but he believed that others in the BNDD might have done so.

Although appellants claim that Nabors was indicted in order to penetrate the defense and learn its tactics, they have presented little evidence that Nabors was involved in appellants' common defense. Although Attorney Milton Henry filed an appearance on behalf of Nabors as he did for all the other defendants, the court's records demonstrate that counsel was also assigned for Nabors on January 25, before he was called before the grand jury. Moreover, on the government's motion,

Nabors' trial was severed from that of the other defendants on the ground that the government expected to call him as a witness. Nabors testified that when he was arrested, he did *not* meet all of the other defendants, talk to them, or know their names. He did recall that he spoke briefly to only one of the appellants, Kilpatrick.

We do not think that the record shows any government misconduct. Appellants have not sustained their burden of showing that Nabors, who was severed for trial, and for whom the district court appointed separate counsel shortly after his arrest, actually intruded into the attorney-client relationship between appellants and their counsel.

B. Pretrial Publicity Resulting from Governmental Disclosures.

Appellants make two contentions about pretrial publicity. First, they contend that the government improperly disclosed to the press information gathered by wire interceptions. Second, they contend that the volume of pretrial publicity made it impossible for them to receive a fair trial.

1. Pretrial Disclosure of Intercepted Communications.

Appellants strenuously contended both in the district court and in briefs and argument on appeal that the government made improper pretrial disclosures of critical information to the press. They urge that pretrial newspaper articles contained "detailed recitals of wire interceptions, which could only have been furnished by the government." The newspaper article principally relied upon to support this contention indicates on its face that its source was a "26-page affidavit [by] an agent of the Federal Bureau of Narcotics and Dangerous Drugs." Moreover, in their amended motion to dismiss for prosecutorial misconduct, appellants specifically argued that it was improper for the government to use information from wire interceptions in an affidavit for a search warrant,

and "then place that affidavit in the custody of a court clerk, without first making provision for its protection from disclosure as required by the plain mandate of the Federal Law."

Thus we understand the gist of appellants' argument to be that the government had a duty to prevent unauthorized disclosures of their intercepted communications, and that the government's failure to prevent disclosure of the information recited in the affidavit requires the dismissal of the charges against them. Appellants rely upon 18 U.S.C. § 2517, which lists situations in which "[a]ny investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication" may disclose or use the information. Subsection (1) permits disclosure to another investigative or law enforcement officer to the extent necessary for the performance of both officers' official duties. Subsection (2) provides generally that intercepted information and communications may be disclosed "to the extent . . . appropriate" to the officer's official duties. And subsection (3) permits disclosure where the officer is giving testimony under oath in a state or federal criminal or grand jury proceeding.[5]

Appellants contend that any disclosure not explicitly authorized by § 2517 is illegal, and they argue that § 2517 did not authorize either investigative or court personnel to disclose the contents of their intercepted communications to the press. Accordingly, they urge that the disclosure to the newspapers was illegal and that the only appropriate remedy is the dismissal of the indictments.

The government argues that subsection (2) authorized government agents to disclose the contents of intercepted com-

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[5] Subsection (5) provides:

> Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

munications in an affidavit for a search warrant. Then F.R. Crim. P. 41(g) required the magistrate before whom the warrant was returned to file the warrant "and all other papers in connection therewith" with the clerk of the district court, where they became a matter of public record. The government argues that dismissal of the charges against appellants is not warranted merely because of the government's failure to take extraordinary measures to seek restriction of access to the court files, especially when appellants made no request for such a restriction of access. The government notes that the wiretap statutes provide three remedies – suppression,[6] civil damages,[7] and criminal penalties.[8] The remedies for unlawful *disclosure* of intercepted communications are civil damages and criminal penalties. The detailed provisions of the Act contain no provision for the dismissal of pending criminal charges.

We agree with the government that appellants have failed to demonstrate any circumstances that warrant dismissal of the charges against them. However, in view of the congressional intention to protect individual privacy, it would be better practice for the government to request, as a matter of course, that the district court restrict access to documents filed with the court that contain intercepted communications.

2. Pretrial Publicity and the Right to a Fair Trial.

Appellants also contend that the pretrial publicity about their cases was so pervasive and inflammatory that they could not receive a fair trial. However, appellants were tried not by a jury, but by experienced district judges. In these circumstances appellants must show that the pretrial publicity resulted in some actual prejudice, and they have failed to do

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[6] 18 U.S.C. § 2515.

[7] 18 U.S.C. § 2520.

[8] 18 U.S.C. § 2511.

so. Moreover, if appellants believed that one or both of the district judges could not try them impartially, the remedy was to seek disqualification. 28 U.S.C. § 144.

C. Interference with George Blair's Marriage to Ruth Ann Burt.

Appellant George Blair contends that in violation of the public policy that protects marriage, government agents intentionally broke up his marriage with Ruth Ann Burt in order to procure her testimony as a government witness. He contends that the convictions of all the appellants rest in large part on Burt's tainted testimony, and should be reversed.

Blair first presented this objection to the district court in a post-trial affidavit in support of his motion for a new trial. Blair did not testify at trial, nor did he present any witnesses who testified that the government "alienated" his marriage to Burt. The district court held that:

> there was no credible evidence indicating any improper conduct on the part of the government; rather the credible evidence, including testimony of defendant's former wife, Ruth Ann Burt, indicated the government did not act improperly.

We hold that the record adequately supports the trial court's finding, which is not clearly erroneous.

D. The Government's Meeting with Blair and Burt.

Both before the district court and on appeal, appellants argue that the government improperly met with appellant George Blair and his then wife Ruth Ann Burt without the presence of, or even notification to, Blair's attorney. Appellants urge that the meeting in the absence of counsel was fundamentally unfair. Moreover, since this was a complex conspiracy case, and Blair's statements could be used to in-

criminate other defendants found to be co-conspirators, appellants argue that the meeting violated the right to counsel of all of the appellants. In support of their contentions appellants cite *State* v. *Britton*, 203 S.E.2d 462 (W. Va. 1974) as authority for reversing a conviction when the prosecution met with a defendant in the absence of his attorney. They contend that the circumstances of the secret meeting with Blair and Burt "irremediably tainted" her testimony.

According to Burt's testimony,[•] about five months after Blair's arrest, when she and Blair were not living together, Agent Garibotto communicated with her about testifying before the grand jury, and she said that she would think about it. Later she called Garibotto and arranged to meet him, telling him that she would bring Blair. When they met, she said that she wanted to negotiate immunity for Blair, and Garibotto replied that he would have to consult the government attorney handling the case. The critical meeting was held at the Ramada Inn. Blair, Burt, Garibotto, and government attorney Wampler were all present. Burt stated that no one took notes, and she did not believe that the conversation was recorded. She did not recall whether anyone gave Blair the *Miranda* warnings. In Blair's presence she told the government agents a good deal about her knowledge of the narcotics organization and Blair's activities. When she was asked if Blair took part in the conversation, she said, "in some areas, yes." She stated that he answered some questions. Burt said that she then asked if Blair could be given immunity in return for her testimony, but that they were told that Blair would not be given immunity unless he testified himself.

At the time of the meeting, Blair and virtually all of those indicted were being represented by one attorney, Milton Henry. The government did not inform Henry of the meeting, nor was Blair asked to contact Henry himself.

[•] Blair did not testify at the trial.

The district court conducted an inquiry into this matter at a post-trial hearing. Government attorney Wampler testified that he had believed that it was Blair's wish that neither his co-defendants nor their common counsel learn of his efforts to obtain immunity in return for Burt's testimony. Moreover, he stated that Blair said little at the meeting, and that the government "didn't rely on anything that was said at the meeting and that's very true."

The trial court held that the government "offered no evidence at trial resulting from any statements made by Miss Burt or defendant Blair at the meeting . . . . [C]learly the testimony of Miss Burt at trial was in no way the fruit of the Ramada Inn discussion." The court recognized the dangers of meeting with a defendant without his counsel, especially when co-defendants are represented by the same counsel, but it held that in this case the contact with Blair was not "improper." The meeting was sought by Burt and not by the government, and it was arranged with Burt, not Blair, who made only "gratuitous" comments that were not used at trial.

We agree with the district court. We are satisfied with the district court's careful inquiry to determine whether any evidence derived from the meeting was used by the government, and with its conclusion that no evidence presented at trial was gained from the meeting. Accordingly, any error committed by the government was harmless whether measured by the ordinary or by the constitutional standard.

Of course, as a general matter, an attorney should not communicate directly with a party whom he knows to be represented by an attorney without the consent of the lawyer. *See* American Bar Association Code of Professional Responsibility, Canon 7, D.R. 7-104(a)(1). Here, however, the meeting was arranged primarily between government agents and Burt, who was not under indictment. The government did not seek the meeting. *Arrington* v. *Maxwell*, 40[illegible] F.2d 849 (6th Cir. 1969). Government attorney Wampler testified that he believed that Blair particularly wanted to keep his attempts to

secure immunity from the other defendants and the counsel who represented them all jointly. *Cf. Arrington, supra.* However, the government did not take the precautions that were possible. It did not encourage or even suggest to Blair that he should either notify Henry or arrange for the appointment of independent counsel who could be present. Although we disapprove of this practice, it bears little resemblance to the outrageous prosecutorial conduct which required reversal in cases cited by appellants. *E.g., United States* v. *Rispo*, 460 F. 2d 965 (3rd Cir. 1972).

III. DID THE DISTRICT COURT ERR IN ADMITTING CHALLENGED EVIDENCE?

Appellants also seek to overturn their convictions on the basis of several rulings by the district court admitting challenged evidence. They contend that the wiretap evidence that figured so prominently in the prosecution's case was inadmissible, first because the government's application was not properly authorized, and also because the application did not meet several statutory requirements. Appellants seek the suppression of the evidence seized at the Hubbell Street house, and from appellants Jones, Hurt, and Woods at the time of their arrests, on Fourth Amendment grounds. Appellants contend that voice exemplars that they were required to give were inadmissible on both Fourth and Fifth Amendment grounds. And finally, they contend that the testimony of Agent Garibotto identifying the voices on the tapes was inadmissible because it was the fruit of informal "aural showups" which violated appellants' Fourth, Fifth, and Sixth Amendment rights.

A. Wiretap Evidence.

The intercepted communications were critical items of proof in the government's case, and appellants contend that the district court erred in refusing to suppress the evidence seized by

the interception. They challenge the validity of the authorization for the government's application for a wiretap order.[10] They also argue that the application did not demonstrate that normal investigative procedures would have been inadequate, nor did it afford the district judge probable cause to believe that the telephone to be tapped was being used or was about to be used for one of the offenses specified in the wiretap statute.

1. The Authorization for the Application for the Wiretap Order.

Appellants argue that the wiretap evidence should have been suppressed because the government's application for the interception order lacked the authorization required by the statute. 18 U.S.C. § 2516(1) provides that:

> The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for . . . an order authorizing or approving the interception of wire or oral communications. . . .

In this case, the written application and the application for an extension stated that Attorney General Mitchell had specially designated *Acting* Assistant Attorney General Henry Peterson to authorize the application to the federal court, and Peterson's letter was attached.

After their indictment, appellants moved to suppress the wiretap evidence on the ground that an *acting* assistant attorney general had no authority to authorize wiretaps pursuant to § 2516. Appellants argue that the applications were insufficient on their face. Section 2518(10)(ii) provides that the contents of intercepted communications may be suppressed

[10] Appellants' challenge applies both to the original application and to the application for the extension. Our discussion applies to both as well.

on the ground that "the order of authorization or approval under which it was intercepted is insufficient on its face."

In *United States* v. *Vigi*, 515 F.2d 290 (6th Cir.), *cert. denied*, 432 U.S. 912 (1975), our court considered this argument and held that it was unnecessary to determine whether an *acting* assistant attorney general who signed the letter authorizing the application could give effective approval under § 2516, because the Attorney General himself had actually approved the application. *Accord, United States* v. *Swann*, 526 F.2d 147 (9th Cir. 1975); *United States* v. *Acon*, 513 F.2d 513 (3d Cir. 1975); *United States* v. *Robertson*, 504 F.2d 289 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975). The same situation is present in this case. The district court found that Peterson had submitted the papers supporting the request for authorization to Attorney General Mitchell, and that Mitchell himself approved the application. The government submitted the affidavit of Sol Lindenbaum who stated that the Attorney General had approved the request for authorization to apply for wiretap orders. Attached to this affidavit were copies of a memorandum from Mitchell to Peterson. In his deposition Lindenbaum identified the handwritten initials on the memos as Mitchell's. Judge Kennedy, who issued the wiretap orders, was told that Mitchell had approved the application. Appellants also contend, however, that Attorney General Mitchell's internal memoranda were ineffective because 28 C.F.R. § 0.180 required the designation of formal orders. Appellants contend that this section is applicable by its own terms to all documents relating to "the assignment . . . or delegations of authority, functions, or duties by the Attorney General." These documents are to be designated as formal "orders" to be issued by the Attorney General in a numbered series. This section is not applicable to delegations of the special authority over applications for interception orders, or to the Attorney General's personal approval of an application for an interception order. Other courts have found even verbal approval by the Attorney General to be

sufficient. *United States* v. *Falcone*, 505 F.2d 478 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975).

Appellants also contend that the affidavit in support of the application for the wiretap failed to make the averments required by 18 U.S.C. § 2518(1)(c). Section 2518(1)(c) requires that an application for an electronic surveillance order contain a "complete statement as to whether or not other investigative procedures have been tried and failed or why they appear to be unlikely to succeed if tried or to be too dangerous. . . ." We hold that the affidavit of Agent Garibotto was a satisfactory statement of the investigative steps taken to date, and that it affords a sufficient reason why normal investigative procedures "appear to be unlikely to succeed."[11]

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[11] Agent Garibotto's affidavit stated in part:

> 19. Normal investigative procedures have not succeeded in establishing the full extent of the activities of Eddie JACKSON and George BLAIR relating to their purchase or sale of controlled substances, nor has Eddie JACKSON's and George BLAIR's source of supply been identified or established. Based on my knowledge and experience as a Special Agent of the Federal Bureau of Narcotics and Dangerous Drugs, and the experience of Supervisory Agents and other Special Agents of the Bureau of Narcotics and Dangerous Drugs, normal investigative procedures reasonably appear to be unlikely to succeed in establishing the identities of Eddie JACKSON's and George BLAIR's co-conspirators, aiders and abettors, their places of operation for their transportation of controlled substances to the Detroit, Michigan area and for their manufacture and distribution of controlled substances within the Detroit, Michigan area, and their times, places, schemes, and manners for selling, buying, possessing, concealing, delivering, distributing, or paying for controlled substances. My experience and the experience of other Federal Agents has shown that narcotics (controlled substance) raids and searches have not, in the past, resulted in obtaining evidence of who the raided violator's co-conspirators, aiders and abettors were, and where their places of operation were to transport controlled substances into an area or manufacture or distribute controlled substances about an area. Experience has shown that controlled substance manufacturers and distributors do not keep records of their controlled substance actions. It is the experienced belief of Special Agents of Region VI that additional surveillances of JACKSON's and BLAIR's and his operation, if continued on a regular basis, will jeopardize the outcome of the investigation, and will do little to reveal the manufacture and distribution network. JACKSON and BLAIR are extremely surveillance conscious and have two men on duty outside 19315 Hubbell to spot surveillance units. Special Agent Smith has been unable to move any further

However, appellants argue that the averments were false and misleading because a government informant, Roosevelt Nabors, had been asked to become a lieutenant in the organization, but had refused on the advice of government agents. This opportunity for infiltration, they argue, would have permitted the government to investigate the organization by normal procedures. The affidavit did not discuss the invitation for Nabors to become a lieutenant. The district judge rejected this argument because, even as a lieutenant, Nabors would have had difficulty in learning all the complex details of the widespread organization, and its aiders and abettors. Moreover, in view of Nabors' lengthy prior criminal record, the government would have had great difficulty in establishing criminal liability by his testimony alone.

We agree with the district court's analysis. The availability of an informant who was offered and declined an opportunity to penetrate deeper into a criminal organization under investigation did not render insufficient Garibotto's statements of the need for wiretaps to discover and prove the liability of the conspirators. *See United States* v. *Pacheco*, 489 F.2d 554, 564-565, *cert. denied*, 421 U.S. 909 (1975).

Appellants' final contention regarding the wire interception is that the affidavit submitted with the application for the wiretap order did not meet the requirement of 18 U.S.C. § 2518(3)(d) that it afford the district court "probable cause

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vertically or horizontally in the JACKSON/BLAIR operation because of JACKSON's and BLAIR's extreme caution. S-1 does not personally know anymore facts concerning the JACKSON/BLAIR operation.

20. For the reasons set out hereinabove, all normal avenues of investigation are closed, and it is my belief that the only reasonable way to develop the necessary evidence to discover the other persons involved in the JACKSON/BLAIR manufacture and distribution of controlled substances network, and their locations and schemes of operation, is to intercept wire communications from the telephone utilized by Eddie JACKSON and George BLAIR located in the premises at 19315 Hubbell, Detroit, Michigan, and carrying telephone number 313-864-4854, which has been, is being, and is about to be used by Eddie JACKSON, George BLAIR and others as yet unknown, in connection with the commission of the above-described offenses.

for the belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of [an offense specified] . . . ." Appellants contend that the application failed to establish probable cause to believe that the telephone in the house on Hubbell Street was being, or was about to be, used to facilitate the distribution of narcotics.

The affidavit recited that on two separate occasions, on October 22 and November 4, a government informant, who consented to having government agents monitor his conversation, called the number registered to the Hubbell Street address and set up a sale at the Hubbell Street house, and the purchased substance was tested and found to be heroin. During the exchange, the agent observed the telephone ring a number of times. He saw appellants Blair and Brown answer the calls. Additionally, Garibotto averred that based upon his experience in narcotics investigations, a telephone was regularly used to negotiate the time, place, and manner of "selling, buying, possessing, concealing, delivering, distributing, or paying for controlled substances."

On review, we must view the affidavit in a common sense fashion, and we think that it afforded probable cause to believe that the telephone at the Hubbell Street address was being used to make the arrangements for a series of narcotics transactions. This is sufficient to satisfy the requirement of § 2518(3)(d).

2. The Arrests of Appellants Jones, Hurt, and Woods.

We next consider the legality of the arrests of appellants Jones, Hurt, and Woods as they left Hubbell Street on the night of December 15. Appellants argue that the government lacked probable cause to make these arrests, and that the evidence seized at the time of the arrests must be suppressed. Earlier in the evening of the night of the arrests,

the agents monitoring the Hubbell Street telephone tap overheard conversations indicating that an expected shipment of narcotics had arrived. Accordingly, a large number of government agents took up surveillance posts near the Hubbell Street house and arrested appellants as they left the structure.

The government intercepted a call from Joe Weaver to appellant Jones about 9 p.m. Weaver told Jones that "Courtney [Brown] wants to see you." Garibotto was informed of this call, and he instructed Agent Smelter that Jones was a close associate of Jackson, and that he should be arrested as he left Hubbell Street.

Agent Dockery testified that he actually arrested Jones. There was no evidence that Dockery knew that Garibotto had identified Jones as a close associate of Jackson's who should be arrested. Dockery testified that when he arrested Jones, he knew that the wire interception indicated that a large shipment of narcotics was concealed at 19315 Hubbell Street, that Weaver had called Jones and told him that Courtney wanted to see him, and that Jones was identified by another agent when he arrived at Hubbell Street. Dockery testified that based on their knowledge of the large quantity of narcotics hidden on the premises, he and the other agents had conferred and determined that anyone seen entering and then leaving 19315 Hubbell would be stopped and searched "on the probable cause that they would be carrying narcotics." He observed Jones' car pull up to the house, and saw its two passengers enter 19315 Hubbell. They departed about five minutes later. Dockery followed them for a short distance, then arrested them. A search revealed that Jones had concealed four cellophane bags containing about one pound of heroin each inside his shirt at the waistband. The evidence of the 1,924.5 grams of heroin was the basis for counts 6 and 10, distribution and possession without intent to distribute heroin.

Agents also intercepted a call from Blair to appellant Hurt on December 15. Blair stated that the heroin was on hand.

Hurt wanted a kilogram, and he was told that he would have to pay cash. Hurt asked the price, and Blair stated that he would call him back. Garibotto was informed of the call, and he stated that Hurt was a substantial customer, and if he came he should be arrested as he left.

Hurt was arrested by Agent Cigich, who testified that "supervisory agents" told him to maintain surveillance at Hubbell Street, and

> should any individual that had arrived at that address get back into their [sic] vehicles and depart, to apprehend and place under arrest the individual.

Hurt arrived and entered 19315 Hubbell. When he departed, Agent Cigich followed and arrested him some distance away. Cigich testified that he found a small packet of white powder "inside the car, lying on the floor next to the driver's front seat." The powder was tested and found to be .268 grams of heroin. Apparently Hurt was the driver and only person in the car at the time of the arrest. The heroin was offered into evidence in support of appellants' convictions on counts 7 and 11, possession and possession with intent to distribute .268 grams of heroin.

There was testimony that agents observed Woods arrive at 19315 Hubbell at about 9:40, and leave a few minutes later. He was arrested by Agent Goldenbaum. Goldenbaum testified that he had been informed by agents monitoring the wiretaps that a narcotics shipment had arrived at Hubbell Street and was being rapidly distributed. He was told to get into a radio car and take up a surveillance position. He learned that at about 9:30 two persons had been arrested leaving the premises, and were found to have suspected narcotics in their possession. At about 9:40, he was informed by radio that a 1969 Chrysler was parked in front of the Hubbell Street house, and he was told to follow it when it left and to arrest appellant Woods. A package containing 37.66 grams of cocaine and 137.5 grams of heroin was found in the pocket of his jacket.

Additionally agents seized $4,809 in cash and a pistol. This evidence was the basis of counts 8 and 9 charging distributing the heroin and cocaine, and supported the conspiracy charge.

The district court upheld each of these arrests. The court held that it was reasonable for the arresting officers to assume that the Jones who was identified arriving at Hubbell Street was the Jones who had called earlier and whom Garibotto had ordered arrested. The court held that although no one actually identified Hurt prior to his arrest, "the officers had enough facts to determine that the man they arrested was Leo Hurt, Jr., and *probably* he was violating federal narcotics statutes." Although there was no intercepted telephone call to Woods, the district court held that the agents had probable cause because they knew that the Hubbell Street house was being used as a distribution site for narcotics on the night of December 15. The court reasoned that it was extremely unlikely that a person would come to the distribution center on that night except for the purpose of illegal narcotics trafficking. Moreover, the agents knew that it was common practice in the narcotics trade to dispense a shipment quickly. Accordingly, when they saw Woods arrive and depart after only a few minutes – just as Jones and Hurt had done a few minutes earlier – they had probable cause to believe that Woods, too, would have narcotics in his possession when he left.

Neither Garibotto's knowledge about Jones and Hurt nor his orders for their arrest can be relied upon to provide probable cause for their arrests, because there was no evidence that any of his comments had been communicated to the agents on the scene who actually made or ordered their arrests.

The government contends that the information known to a superior officer may be imputed to the arresting officer, *citing United States* v. *Trabucco*, 424 F.2d 1311, 1315 (5th Cir. 1970), *cert. denied*, 399 U.S. 918 (1970), and that the collective knowledge of agents working as a team is to be considered together in determining probable cause. *E.g.*, *United States* v. *Caniesco*, 470 F.2d 1224, 1230 n. 7 (2d Cir. 1972);

United States v. *Stratton*, 453 F.2d 36 (8th Cir. 1972), *cert. denied*, 405 U.S. 1069 (1972). When a superior officer orders another officer to make an arrest, it is proper to consider the superior's knowledge in determining whether there was probable cause. Likewise, when a group of agents in close communication with one another determines that it is proper to arrest an individual, the knowledge of the group that made the decision may be considered in determining probable cause, not just the knowledge of the individual officer who physically effected the arrest. But here, in contrast, because there was no evidence that Garibotto's order to arrest either Jones or Hurt was the basis of their arrests, his knowledge cannot be considered in determining probable cause. On the other hand, we do mutually impute the knowledge of all the agents working together on the scene and in communication with each other. Therefore it was proper to consider not only the facts known to Agent Goldenbaum when he arrested Woods, but also the information known to the officers who saw Woods visit 19315 Hubbell and ordered Goldenbaum to follow and arrest him.

When Dockery arrested Jones, he knew that Jones had received a call from the Hubbell Street telephone that evening, that narcotics were believed to be concealed on the premises, and that the person he saw enter and leave the premises was known to another agent on the scene as Alphonzo Jones. Dockery testified that he had conferred with the other agents on the scene and determined that anyone who visited 19315 Hubbell Street was likely to be carrying narcotics when he left. The district court's discussion of Woods' arrest indicates that it determined that the agents on the scene knew that 19315 was being used as a narcotics distribution center that evening, and we assume that Dockery learned as much from his conference with the other agents.

These facts are sufficient to afford probable cause to believe that Jones had been trafficking in heroin. Of course if the

government had offered evidence that the agents on the scene were aware of Jones' close association with Jackson at the time of the arrest, this additional evidence would have strengthened the probable cause. Mere presence at a place where the government believes illegal drugs will be distributed will not provide probable cause for an arrest on narcotics charges. *See Sibron* v. *New York*, 392 U.S. 40 (1968). But here we think that the agent who made the arrest did have reason to believe that it was more likely than not that Jones was in possession of narcotics when he left 19315 Hubbell. 19315 was a story-and-one-half bungalow, and agents knew that it was used as a headquarters and distribution site for narcotics. They also knew that a large shipment of narcotics had arrived. Since Dockery had a conference with the other agents, and knew of the call to Jones, we think that it is legitimate to assume that he knew that the wiretap indicated that the shipment was to be distributed to callers *that evening*. In this circumstance, as the district court reasoned in connection with Woods, it was more likely than not that a visitor on the night of December 15 was there to pick up narcotics, especially when he had been called earlier that night from the Hubbell Street address. Accordingly, the arrest was lawful and the evidence seized from Jones was properly admitted.

In the case of appellant Hurt, the same reasoning applies. Agent Cigich testified that he made the arrest because of a general order by his supervisors to arrest anyone leaving 19315 Hubbell that evening. Although the government did not prove that the call from Blair to Hurt negotiating the sale of a kilogram had been communicated to Cigich or to the other agents on the scene, we assume that the supervisory agents who gave these orders knew of the anticipated distribution from the Hubbell Street house *that evening*. As in the case of appellant Jones, there was probable cause to arrest Hurt immediately after his brief visit to the house. The totality of the circumstances suggested

no reason for his presence other than to engage in narcotics traffic.

In the case of appellant Woods, moreover, the agents had more than simply the expectation that 19315 Hubbell was to serve as a distribution site that evening. They also knew that two other persons who had arrived shortly before Woods had been arrested and were found to have suspected narcotics in their possession. Additionally, as the district court noted, the agents knew that once a narcotics shipment arrives, it is distributed very quickly. In these circumstances, we agree with the district court that the facts known to the officers who ordered the arrest of Woods, and of which they had reasonably trustworthy information, " 'were sufficient to warrant a prudent man in the belief that [Woods] had committed or was committing an offense.' " *Adams* v. *Williams*, 407 U.S. 143, 148 (1972), *quoting Beck* v. *Ohio*, 379 U.S. 89, 91 (1964).

Accordingly, we hold that the evidence seized at the arrests of appellants Hurt, Jones, and Woods was legally seized, and was admissible to prove their guilt. Since we find that there was probable cause for the arrest of Cara Woods, the evidence seized at the time of the arrest was admissible, and we have no occasion to consider whether the statements he later made were independent of his arrest.

B. The Evidence Seized from the Hubbell Street Premises.

A large quantity of narcotics was seized from the house on Hubbell Street on December 15, shortly after the arrests of appellants Jackson, Brown, Blair, and Joseph and Reginald Weaver. Appellants contend that these arrests were purposely delayed until appellants were inside the Hubbell Street house, and that they were used as a pretext for making a search of the premises without a warrant.

The arrests were made at approximately 10 p.m. on December 15. According to the testimony at the suppression hearing, about 6 p.m. that evening, government agents who were

monitoring the Hubbell Street wiretaps informed Agent Garibotto that several calls suggested that a long awaited shipment of narcotics had arrived. Garibotto testified that he and government attorneys immediately began to prepare affidavits in support of a search warrant for Hubbell Street. Since these calls also indicated to Garibotto that buyers had arranged to come to Hubbell Street, he ordered the agents in the Hubbell Street vicinity to be alerted for the buyers' arrival. At approximately 9:45 Garibotto, who was on the way to the home of a district judge to present the affidavits, was notified of the arrests of Jones, Hurt, and Woods as they left Hubbell Street. He was also told that each of them was found to be in possession of narcotics when arrested. At that time Garibotto ordered the agents on the scene to arrest Jackson and the others found in the Hubbell Street house. At approximately 10 p.m. at the home of the district judge, when he was notified that the arrests had been made, and that suspected narcotics had been found in plain view, he added this information to the affidavit. The district judge issued a search warrant for the house on Hubbell Street, and a full search was made pursuant thereto. A large quantity of narcotics was found and was later introduced into evidence at appellants' trial.

Appellants contend that Garibotto purposely ordered the arrests to be made at the Hubbell Street house as a subterfuge to permit a search of the premises without a warrant. Garibotto denied that he delayed the arrests for that reason. Both appellants and the government rely upon Garibotto's statement of his purpose for ordering the arrests at that time. He testified:

> Well, the circumstances at the Hubbell address mandated that the arrest be made at that time. Our forces were diffused at the time. We knew there were a great number of customers heading to the Hubbell address to purchase heroin and cocaine. We made three arrests, there were three seizures. We knew that our forces were

> spread around the immediate vicinity. We were just concerned that the evidence that was on hand at Hubbell would be distributed to the streets and would not be seized.

The district court upheld the seizure of the challenged evidence on two grounds. First, it held that

> [d]espite substantial testimony about the arrests themselves at Hubbell, no persuasive facts were presented to support defendants' allegation that Jackson could have been arrested prior to his entering the house on Hubbell.

Additionally, the court held that even assuming that the agents had improperly delayed the arrests to gain entry into the house without a warrant, the search that was later conducted pursuant to a warrant was not tainted. The court reasoned that the district judge, who received lengthy affidavits prepared *before* the arrests (to which only one handwritten paragraph had been added *after* the arrests), had before her sufficient unchallenged facts to afford probable cause for a search. The improper addition could therefore be ignored.

Our court has repeatedly made it clear that:

> An arrest may not be used as a pretext or subterfuge for making a search of premises without a search warrant where ordinarily one would be required under the Fourth Amendment. If, in fact, the primary purpose of forcibly entering a person's home is to search for evidence with which to convict him of crime, the evidence so obtained is not admissible in court.

United States v. *Harris*, 321 F.2d 739, 741 (6th Cir. 1963), *quoted in United States* v. *Carriger*, No. 74-1901 (6th Cir. 1976, decided and filed, August 25, 1976) [Footnote omitted]. As Chief Judge Cecil stated in *Harris*,

> The real purpose of the agents must be determined from all of the facts and circumstances surrounding the

> arrest of the defendant and the search of his apartment. The court is not bound to accept the purpose as stated by the agents as controlling.

321 F.2d 741.

Appellants argue that probable cause to arrest Jackson, Brown, and Blair existed after the October 22 and November 4 sales to the undercover agent. Moreover, they emphasize that Jackson was under government surveillance before he arrived at Hubbell Street, but he was not arrested until *after* he was on the premises. They argue that Garibotto's statement quoted above admits that his purpose in ordering the arrests was to permit the warrantless search and seizure of narcotics.

Although the district court did not focus on the issue as stated in *Harris*, its determination that the defendants did not prove that Jackson could have been arrested sooner implies that the government did *not* make the arrests as a pretext for a warrantless search. The arrests were ordered as soon as the buyers who had called earlier left the premises, were arrested, and were found to be in possession of narcotics. Taken with the reports of the outgoing calls from Hubbell setting up additional sales, this firmly established that the narcotics shipment had arrived, and that the occupants of the house were distributing it rapidly. This knowledge afforded probable cause to arrest all the occupants of the house, not just Jackson. Moreover, we think that Garibotto's testimony indicates that there was real concern for preventing the unlawful distribution of a large shipment of narcotics to other purchasers, as well as a desire to effect the arrests while there was sufficient manpower available. The record does not indicate that the government was trying to avoid getting a warrant to search Hubbell Street. In fact, when Garibotto ordered the arrests he was on his way to the home of a district judge with detailed affidavits, and he added only a brief handwritten statement after he learned of the arrests. The district judge actually

issued a warrant within minutes of the entry and arrests. No search of the premises was made until the warrant was issued. The facts and circumstances surrounding the arrests thus demonstrate that the government did not manipulate the arrests in order to avoid the Fourth Amendment warrant requirement, and we hold that the evidence seized from Hubbell Street was properly admitted.

C. Formal Voice Exemplars.

Appellants contend that the district court's order requiring them to give formal voice exemplars violated their privilege against self-incrimination and constituted an illegal search and seizure. Accordingly, they argue that neither the exemplars nor identification testimony based upon the exemplars was admissible. In *United States* v. *Franks*, 511 F.2d 25, 33 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975) we rejected these arguments, holding:

> Mitchell and Britton claim that the court order compelling them to give voice exemplars violated their constitutional right against unreasonable searches and seizures and their constitutional privilege against self-incrimination. United States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973), established that compelling voiceprints even of the same words used in the crime does not violate the constitutional privilege against self-incrimination. Accord, United States v. Rogers, 475 F.2d 821, 825-826 (7th Cir. 1973). Moreover, compelling a voiceprint is neither a "search" nor a "seizure." *Dionisio*, 410 U.S. at 14-15, 93 S.Ct. 764. We reject Mitchell's attempt to limit *Dionisio* to the grand jury context in that, so long as the underlying seizure of the person is proper, requiring that person to submit voice exemplars violates no constitutional right. See United States v. Rogers, 475 F.2d 821 (7th Cir. 1973) (court-ordered submission); United States v. Sanders, 477 F.2d 112 (5th Cir.), cert. denied, 414 U.S. 870, 94 S.Ct. 88, 38 L.Ed.2d 88 (1973) (legally in custody on another matter).

D. Informal "Aural Show Ups."

Appellants also contend that their Fourth Amendment rights and their privilege against self-incrimination were violated, and their Sixth Amendment right to counsel denied, at a series of informal "aural show ups." Appellants allege that government agents created opportunities to speak to each of the appellants both in person after their arrests, and later over the telephone by setting up a lengthy procedure for the return of their seized property. Agents testified that they did not give the warnings detailed in *Miranda* v. *Arizona*, 386 U.S. 436 (1966) when they spoke to appellants on these occasions,[12] and appellants did not have their counsel present.

As we stated in connection with the formal voice exemplars, *supra*, neither the Fourth Amendment nor the privilege against self-incrimination is violated by the disclosure, even if compelled, of a person's voice. Appellants' complaint is not that their statements were used to incriminate them in a testimonial sense, but that the agents were able to recognize their voices on the tapes after having heard them in person and over the telephone.

Appellants also claim, however, that because the "aural show ups" formed the basis for the critical testimony identifying their voices on the tapes, they were critical stages at which the Sixth Amendment guaranteed appellants' right to counsel. A review of the testimony indicates that Agent Garibotto did speak to several of appellants briefly after their arrests, and later over the telephone. These conversations appear to have been brief and matter of fact, concerning such routine matters as the return of property which had been seized. There is no requirement that counsel be present for conversations about such routine matters when no effort at interrogation is made.

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[12] Appellants do not contend that they were not given their *Miranda* warnings before formal custodial interrogations.

IV. WAS THERE SUFFICIENT PROOF OF APPELLANTS' GUILT ON EACH OF THE COUNTS?

Next we consider the sufficiency of the proofs supporting appellants' convictions on the various counts of the indictment. First, appellants assert that the *Pinkerton* rule should not be applied to convict defendants, found to be conspirators, of each of the substantive counts without proof that each defendant actually took part in the individual transactions. Second, several appellants challenge the sufficiency of the evidence linking them to the conspiracy. Last, we will consider challenges to the proofs on counts 3, 4, 8 and 9.

A. The Pinkerton Rule.

Appellants vigorously attack the validity of the rule announced in *Pinkerton* v. *United States*, 328 U.S. 640 (1946) that even if he did no more than join a conspiracy, a conspirator can be convicted of any substantive offense committed in furtherance of the conspiracy and as a part of it. Appellants contend that the *Pinkerton* rule is bad law, and that this court should not follow it. Our court, however, is constitutionally required to follow the Supreme Court's decision in *Pinkerton* and the cases following it, which have never been overruled, or even questioned by the Supreme Court.

B. The Sufficiency of the Evidence of Conspiracy.

Appellants Kilpatrick, Riggs, Rudolph, Cavanaugh, Horne, Hurt, and Garrett challenge the sufficiency of the evidence supporting their convictions. Since each of them was found guilty of conspiracy, count 1, under the *Pinkerton* rule, they could also be convicted of counts 3 and 4 and counts 6 through 16, which charged crimes that were part of and in furtherance of the conspiracy. Appellants contend, however, that there was insufficient evidence to support their convictions on the conspiracy charge.

In reviewing the sufficiency of the proof of appellants' guilt, we will be guided by the following general principles. The evidence will be viewed in the light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60 (1942). Moreover, there are special evidentiary rules applicable to conspiracy cases. As we stated in *United States* v. *Mayes*, 512 F.2d 637, 651 (6th Cir.), *cert. denied*, 422 U.S. 1008 (1975):

> a prima facie case of the conspiracy and the defendant's connection with it must be established by evidence independent of that offered as an admission of a co-conspirator. . . . However, a prima facie case is less than proof beyond a reasonable doubt; indeed, it is less than a preponderance. . . . Moreover, the prima facie case need not be established before the proffered hearsay may be admitted; the judge may admit it conditionally. It is sufficient if at the close of the government's proofs, a prima facie case of conspiracy and the defendant's conection with it has been established by "independent or disassociated evidence."

Applying these principles, we turn to the evidence that is claimed to support the finding that each of these appellants were conspirators.

Willie Lee Kilpatrick

Appellant Kilpatrick was convicted of conspiracy, count 1, by Judge Pratt, and under the *Pinkerton* rule he was also convicted on counts 3, 4, and 6 through 16. We hold that the evidence was adequate to support his conviction on the conspiracy count, and we have already discussed the *Pinkerton* rule *supra*. The following evidence supported the district court's conclusion that Kilpatrick "was involved in narcotic trafficking, was clearly associated with defendant Jackson and connected with the other conspirators . . . [and] was in the 'lieutenant' echelon of the Jackson organization. . . ." Kil-

patrick flew to New York with appellant Riggs (Jackson's girlfriend), who was arrested carrying a quantity of narcotics when she attempted to return to Detroit. Informant Nabors testified that he observed Kilpatrick at 19315 Hubbell Street at the time scheduled for a meeting of the Jackson organization lieutenants. When Nabors refused the organization's invitation to become a lieutenant, he was not allowed to stay. A search of Kilpatrick's apartment produced substances used to dilute heroin, narcotics paraphernalia, and firearms. Kilpatrick's address book listed the names of other conspirators, and he was likewise found listed in their books.

Lee Hurt

Judge Feikens convicted appellant Hurt on count 1 because he found beyond a reasonable doubt that Hurt purchased from the Jackson organization large quantities of narcotics for wholesale distribution. The district court took special note of a call that Hurt made by Blair in which Hurt stated that his customers were complaining about the quality of the narcotics he had sold them. Judge Feikens observed that Hurt was mentioned in the telephone and address books of several of the conspirators. Finally, Hurt was called to the Hubbell Street house on December 15 when the large shipment was being distributed, and he was arrested with heroin in his possession when he left. Although the heroin was found in Hurt's car, not on his person, there was ample evidence to support a finding of possession, since he was apparently the only person in the car, and the heroin was found on the floor by the driver's seat. This evidence is sufficient to support the conclusion that Hurt, like Cavanaugh and Rudolph, was a major distributor for and a member of the conspiracy. Accordingly, we affirm Hurt's conviction on count 1. Under the *Pinkerton* rule, the conviction on count 1 permitted his conviction on the counts charging the substantive crimes committed in furtherance of the conspiracy as well, including count 7. Accordingly, we need not discuss Hurt's argument

that there was insufficient evidence to convict him on count 7, although we conclude that even without the *Pinkerton* rule, there was sufficient evidence to sustain his conviction on this charge.

Hurt also contends, relying upon *Kotteakos* v. *United States*, 328 U.S. 750 (1946), that the evidence shows only a "hub and spoke" cluster of several conspiracies, each between an individual dealer and the "hub" consisting of Jackson and his lieutenants. In *Kotteakos*, however, defendant Brown specialized in obtaining loans from the Federal Housing Administration by false and fraudulent applications. Several defendants, each of whom had obtained such a loan falsely and fraudulently, were charged with and convicted of a single all-encompassing conspiracy. The Supreme Court held that there was proof, not of a single, but of several conspiracies, and reversed the convictions.

Hurt, however, was a distributor with an ongoing relationship with the conspiracy to distribute illegal narcotics. He depended for his success upon the continuing vitality of the entire conspiracy. This is particularly true in the narcotics business, because new customers of each seller may become, by reason of addiction, a lifetime potential market for all other sellers.

Fairh Lee Riggs

Judge Feikens convicted appellant Riggs of conspiracy, count 1, concluding that she knowingly and intentionally joined the conspiracy, and that she was "an important courier in the transportation of narcotics" as well as "an intimate associate of Jackson." We hold that the evidence was sufficient to convict Riggs of conspiracy. Riggs had travelled to New York with appellant Kilpatrick and defendant Reynolds in September 1971. All three used assumed names. When airlines personnel examined appellant Riggs' carry-on luggage, they observed an estimated $30,000 in cash in a paper bag. Riggs

was arrested later that day when she returned to the New York airport for a return flight to Detroit. Her luggage contained 1,917 grams of heroin and almost $5,000 in cash. She was convicted of possession of the heroin in the Eastern District of New York, and the conviction was affirmed. *United States* v. *Riggs*, 474 F.2d 699 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973). By stipulation, the record in the New York case was incorporated into these proceedings. Riggs was Jackson's girlfriend. He arranged to take calls from another conspirator at her house. Riggs' name and telephone number, along with those of several other appellants, were found in appellant Rudolph's address book. This evidence was adequate to establish a prima facie case that appellant Riggs knowingly joined the conspiracy. Accordingly, other evidence of hearsay statements by other conspirators was admissible to strengthen the case against Riggs. Burt's testimony indicated that the Jackson organization procured several large shipments of narcotics from a source in New York. Additionally Jackson told Burt that he believed the Riggs arrest must have been a "set-up" because the two men with her were not arrested. Jackson tried to raise a large sum because his "old lady" was in jail in New York, and Blair told Burt that Jackson was trying to find a lawyer for Riggs. This evidence amply supports the conviction of Riggs on count 1.

Samuel (Eugene) Horne

Judge Feikens concluded that it was "clear beyond a reasonable doubt that defendant Samuel Horne knowingly and intentionally joined the conspiracy." He concluded that Horne's "principal activity" for the organization was "wholesale distribution of narcotics." The government intercepted telephone conferences between Horne and Joseph Weaver, Brown, Blair, and Jackson. In particular, Judge Feikens noted that on December 9 Horne called Jackson and attempted to arrange a sale to a customer who wanted a "full thing" for

$15,000. This evidence was more than ample to support Horne's conviction of conspiracy.

Charles Cavanaugh

Judge Feikens convicted Cavanaugh of count 1, conspiracy, holding that he was one of the organization's "wholesale distributors," and that he "engaged in other kinds of supply activity for the group." Burt testified that she and Blair delivered cocaine to Cavanaugh in exchange for three outfits of clothing. The wiretap intercepted a number of calls from Cavanaugh to the Hubbell Street telephone inquiring about the availability of narcotics. Cavanaugh indicated his familiarity with various key members of the organization by calling and asking to speak to "George [Blair], Brown, or the big man [Jackson]." In these calls Cavanaugh made arrangements for sales, complained about the quality of the narcotics that he had received, saying at one point that he had had to return his customers' money. On December 14 Jackson agreed to sell Cavanaugh 13 quarters of heroin.

This evidence was more than sufficient to prove Cavanaugh's part in the conspiracy. *See, e.g., United States* v. *Tramunti*, 513 F.2d 1087, 1112 (2d Cir.); *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Varelli*, 407 F.2d 735, 748 (7th Cir. 1969), *cert. denied, sub nom. Saletko* v. *United States*, 405 U.S. 1040 (1972); *United States* v. *Aviles*, 274 F.2d 179, 188 (2d Cir. 1960).

Charles Rudolph

Judge Feikens also convicted appellant Rudolph on the conspiracy count. He held that Rudolph was "deeply involved in wholesale distribution of drugs for the group." Judge Feikens cited as evidence Rudolph's telephone calls, his account records, and his automatic telephone dialing cards for other conspirators, as well as the fact that Rudolph was listed in the telephone and address books of other conspirators. In one

telephone call, Rudolph told Brown he was "getting low," and he would take a quantity of narcotics being held for another buyer if that transaction did not go through. Brown called Rudolph a few days before the last big delivery to tell him that the narcotics would be around in a few days, and Rudolph said that he would wait. An outgoing call to Rudolph's telephone was made from Hubbell Street on December 15 when the expected shipment was being distributed, but there was no answer. A search of appellant's home yielded 417 grams of heroin, common diluents, guns, ammunition, and a record book including the names of other conspirators and sums of money. This evidence established a prima facie showing of his status as a conspirator, and made admissible Burt's testimony that Blair told her Rudolph had once been a Jackson lieutenant, but that he "broke away" and now specialized in selling "quarters" of heroin and cocaine. It is immaterial that Rudolph no longer served the Jackson organization as a lieutenant, since he still acted as a major distributor for the organization. The evidence adequately supports his conviction.

Ronald Garrett

Judge Feikens found appellant Garrett guilty of conspiracy on the basis of the following evidence: Garrett's telephone number was listed in Kilpatrick's address book and in Rudolph's telephone and address book, and he had a substantial account listed in Rudolph's account book. Additionally, Garrett figured prominently in a number of intercepted telephone conversations. Since Garrett was not one of the speakers in these conversations, they are admissible to prove the truth of the matters asserted only if a prima facie case is made that Garrett was one of the conspirators. However, Judge Feikens properly relied upon the fact that several of the conspirators mentioned Garrett repeatedly in the course of discussions regarding their narcotics transactions. Evidence that

his name was mentioned repeatedly in the context of the narcotics transactions was not hearsay, and was competent evidence tending to show that he was a conspirator. It should be unnecessary to emphasize that proof of an illegal conspiracy is seldom direct. More often, there is only indirect proof of the unlawful agreement. We are required by *Glasser* to view the evidence in the light most favorable to the government. Accordingly, we hold that a prima facie case of conspiracy, although a minimal one, is established by the evidence of the telephone calls, considered together with the address books and Rudolph's account book, which indicated a substantial sum of money for Garrett, as well as for other persons shown to be conspirators. Accordingly, the substance of the telephone conversations, in which other conspirators' statements indicated Garrett's deep involvement, was admissible. In addition, Burt's hearsay testimony that she helped Blair make a delivery which he said was for "Five-O" was admissible to prove Garrett's complicity. Burt identified Garrett as "Five-O" at trial. This evidence was adequate to support Garrett's conviction on count 1.

C. Counts 3 and 4

Appellants Brown, Bell, Riggs, Horne, Garrett, Jones, and Rudolph challenge the sufficiency of the evidence to support their convictions of count 3, the October 22 sale to Special Agent Smith, and of count 4, the November 4 sale. Since we have affirmed their convictions of conspiracy under count 1, appellants were properly convicted of the substantive charges in these counts as well under the *Pinkerton* rule.

D. Counts 8 and 9

Appellants challenge the validity of convicting them on count 8 (distribution of 137.35 grams of heroin) and count 9 (distribution of 37.66 grams of cocaine) in view of the fact that the district court acquitted Cara Woods, in whose posses-

sion the heroin and cocaine were found, of the conspiracy charge. Appellants contend that since Woods was not a member of the conspiracy, his statement to Agent Garibotto regarding the source of the narcotics was hearsay and therefore not admissible to prove the guilt of the conspirators. Accordingly, they argue that there was no proof that Woods had obtained the narcotics from 19315 Hubbell. We disagree. There was compelling circumstantial evidence that the heroin and cocaine referred to in counts 8 and 9 were procured from the Jackson organization at 19315 Hubbell. Woods visited the Hubbell Street address briefly on the night of the 15th of December when a large shipment of narcotics was being rapidly distributed, and when he was arrested just as he left he was found in possession of the narcotics. Minutes before two other persons had entered briefly, and when they left they too had been arrested and were found to be in possession of narcotics. We thing that this is ample evidence to support a finding that the narcotics seized from Cara Woods were distributed by the Jackson organization, and that therefore all of the conspirators could be convicted of counts 8 and 9 under the *Pinkerton* rule.

V. WERE BLAIR AND HURT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL?

Appellant Blair argues that although the two defense attorneys who represented all defendants at the trial were very well qualified, he did not receive effective assistance of counsel because of the inherent conflict of interest between their representation of Jackson, the "kingpin" or "boss," and that of minor defendants such as Blair. He argues that he did not even have a fee-paying relationship with the defense attorneys, who were primarily concerned with Jackson. He also contends that conflict arose between himself and the other defendants when proof was introduced about his secret efforts to secure immunity in return for the testimony of Ruth Ann Burt.

However, the record reveals that in open court, Blair declined the tendered option of having his case severed from that of the other defendants, with separate counsel appointed to represent him. Blair was not present in the courtroom for the first five days of trial, and the district court granted the government's motion to sever him. On the sixth day, however, Blair appeared in court, and counsel for all of the defendants stated that Blair still wished to be tried with the other defendants. Blair was questioned both by defense counsel and by the court about his willingness to waive his right to be present for the first days of the trial. He waived that right, his right to trial by jury, and agreed to the simultaneous bench trial. He was also questioned as follows:

> Mr. Rothblatt: And you also understand on this indictment Mr. Henry and I represent a number of other defendants, as well as yourself, and it's been suggested there is a possibility there may be some confliction, because we represent some of the other defendants; we may not be representing you as effectively as we might be, since we represent other defendants. Now, you understand you have a right to any other attorney represent you, and if you can't afford a lawyer, the Court will assign a lawyer to you free of charge; do you understand that?
>
> Mr. Blair: Yes.
>
> Mr. Rothblatt: And you agree that Mr. Henry and I and Mr. Halpern will continue with your representation, along with the other defendants in this case?
>
> Mr. Blair: Yes.

Blair first made a claim of ineffective assistance of counsel in a motion for a new trial. The district court held that mere dissension or hostility between defendants does not render their representation by the same counsel inadequate. The court observed that Blair's request to be tried with the other defendants could be treated as a waiver of this objection. Finally, the court determined that his

> allegation that his counsel had difficulty keeping his defense at heart is totally without support in the record. It shows that defendant expressly chose his counsel after the court explained his right to be represented by an attorney of his choice and that the attorney chosen ably represented him at all stages of the trial.

The Sixth Amendment guarantees the right to counsel in criminal proceedings, and a conflict of interest on the part of counsel representing two defendants may deprive the accused of the effective assistance of counsel. *Glasser* v. *United States*, 315 U.S. 60 (1942). However, the mere fact of joint representation does not *per se* establish a denial of the effective assistance of counsel. *United States* v. *Wayman*, 510 F.2d 1020, 1025 (5th Cir. 1975), *cert. denied*, — U.S. — (19—). Our court requires a party claiming that joint representation resulted in a conflict of interest to demonstrate that some actual prejudice resulted to him. *United States* v. *Burkeen*, 355 F.2d 241, 244 (6th Cir.), *cert. denied sub. nom. Matlock* v. *United States*, 384 U.S. 957 (1966); *United States* v. *Cale*, 418 F.2d 897 (6th Cir. 1969), *cert. denied*, 397 U.S. 1015 (1970).

Here appellant identified two grounds of conflict. First, he argues that he was only a minor party, and that counsel was concerned primarily with the "kingpin" of the organization. The record does not bear this argument out. Blair was shown to be one of Jackson's primary aides, or lieutenants, not just a minor figure. Moreover, the district court found, and we agree, that counsel ably represented Blair. Second, Blair contends that the disclosure of his secret attempts to gain immunity drove a wedge between him and the other defendants. Although some of the other defendants may have had reason to feel that Blair had acted disloyally to *them* in a personal sense, he has not demonstrated that this hostility affected counsels' ability to continue joint representation. Blair's defense was not shown to be inconsistent with that of Jackson or the other co-defendants. All, for example, were equally eager to dis-

credit the testimony of Burt, Blair's former wife. We find no actual conflict of interest preventing adequate representation of appellant Blair. Moreover, it would be especially inappropriate for us to infer prejudice from the mere fact of joint representation where, as was the case here, the defendant was advised of the possibility of a conflict of interest, and of his right to sever his case and be represented by separate appointed counsel.

Appellant Hurt also attacks the adequacy of his representation by counsel. Compared to appellant Blair, Hurt was a lesser figure in the conspiracy. Nevertheless, Hurt has not carried his burden of proving the existence of a conflict of interests between himself and the more important conspirators that resulted in actual prejudice to him. He had more than minimal contacts with the conspiracy, and repeatedly obtained narcotics for distribution.

Hurt concedes that counsel succeeded in securing acquittal for some defendants. He argues that because the trial court concluded that the evidence against him was "not as overwhelming" as against the other convicted defendants, truly adequate representation would have secured acquittal. But the trial court's conclusion is equally consistent with adequacy of representation insofar as it indicates that, unlike most other defendants, Hurt's defense was almost successful.

VI. WERE THE SENTENCES IMPOSED BY JUDGE FEIKENS IMPROPER?

Appellants' final contention is that the sentences imposed by Judge Feikens on the defendants tried before him were improper because they were imposed in deference to community sentiments, and to deter future violators without regard to the "militating" [sic mitigating?] factors in the individual cases. They also contend that the sentences imposed by Judge Feikens were harsher than those imposed by Judge Pratt for identical conduct.

It is well settled that except in the most exceptional circumstances, an appellate court will not disturb a sentence that is within the limits set by statute. The severity of a sentence is normally committed to the discretion of the trial court. *See Dorszynski* v. *United States*, 418 U.S. 424, 440-441 (1974); *United States* v. *Phillips*, 510 F.2d 134 (6th Cir. 1975). Appellants do not contend and cannot demonstrate that the sentences imposed by Judge Feikens exceeded the maximum limits permitted by statute. Instead, they contend that the sentences were not set with proper regard for the individual circumstances of each defendant, and that they should have been more compatible with those imposed by Judge Pratt. The record, however, indicates that Judge Feikens did take the individual circumstances of the defendants and the enormity of their offenses into consideration in determining the proper sentences, and we find no abuse of his discretion.

VII. CONCLUSION.

We have determined that the contentions which we have not treated above do not require discussion. We also observe that it is indeed rare for a lengthy trial not to produce some errors, and this unusual proceeding is no exception to the general rule. In some cases, the cumulative weight of a large number of errors otherwise inconsequential in isolation might render a proceeding unfair. We have examined this record with that possibility in mind and have concluded that in spite of minor errors, this was a fair trial for all appellants.

For the foregoing reasons, the judgments of conviction are AFFIRMED.

ORDER DENYING PETITION
FOR REHEARING

NOS. 74-2338 thru 74-2353

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee O R D E R

- vs -

WILLIE LEE KILPATRICK, et al.,

Defendants-Appellants

/

BEFORE: CELEBREZZE and MC CREE, Circuit Judges.

The petition for rehearing with suggestion for en banc consideration having come on to be heard, and appellee's response to the petition for rehearing having been received and considered, and no judge having requested a vote on the suggestion for rehearing en banc, and the motion having therefore been referred to the panel that heard the case, upon consideration, it is ORDERED that the petition be, and it hereby is, DENIED.

Entered by order of the court

/s/ John P. Hehman
Clerk

[Filed February 2, 1977]

EXCERPT OF
MEMORANDUM OPINION AND ORDER
DENYING MOTION TO SUPPRESS
WIRETAP EVIDENCE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, CRIMINAL ACTION

vs. NO. 46597

EDDIE JACKSON, et al.,

Defendants.

/

UNITED STATES OF AMERICA,

Plaintiff, CRIMINAL ACTION

vs. NO. 46598

WILLIE LEE KILPATRICK, et al.,

Defendants.

/

MEMORANDUM OPINION AND ORDER

Defendants in the above captioned cases have moved to suppress all evidence

obtained from Wire Interception Orders No. 11-11-71-CK and No. 12-1-71-CK. . . .

* * *

Defendants also contend that the wire tap orders are defective because they do not contain a finding that:

> Normal investigative procedures have been tried and failed . . .

However, the applications, affidavits in support thereof, and the orders themselves contain an equally acceptable finding that:

> [N]ormal investigative procedures reasonably appear to be unlikely to succeed.

Such a finding satisfies the requirements for a wire tap order. 18 U.S.C. § 2518(3)(c). Likewise, the factual recitation in the affidavits in support of the applications fully support such a finding in fulfillment of 18 U.S.C. § 2518(1)(c).

* * *

For the reasons given the defendants' motion to suppress the evidence procured by wire tap orders in the above-captioned case is hereby ORDERED DENIED.

/s/ John Feikens
JOHN FEIKENS
United States District Judge

/s/ Philip Pratt
PHILIP PRATT
United States District Judge

Dated: June 16, 1972

EXCERPT OF
MEMORANDUM OPINION DENYING DEFENDANTS' MOTION FOR REHEARING RE: SUPPRESSION OF WIRETAP EVIDENCE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, CRIMINAL NO. 46597

vs.

EDDIE JACKSON, et al.,

Defendants.

/

UNITED STATES OF AMERICA,

Plaintiff, CRIMINAL NO. 46598

vs.

WILL LEE KILPATRICK, et al.,

Defendants.

/

MEMORANDUM OPINION DENYING DEFENDANTS' MOTION FOR REHEARING RE: SUPPRESSION OF WIRETAP EVIDENCE

Defendants have moved for a rehearing

on their Motion to Suppress Wiretap Evidence. This Motion is denied; but the Court does, however, wish to amplify its reasoning expressed on some of the issues in the earlier opinion on this subject issued June 16, 1972.

* * *

Defendants next contend that the applications presented to Judge Kennedy on November 11, and December 1, 1971 were fatally defective because they did not allege that "normal investigative procedures have been tried and . . . reasonably appear unlikely to succeed." The relevant statutory section here is § 2518(3)(c), which reads as follows:

> "(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."

Althougn Congress might have more artfully drafted the subsection, the two words "if tried" at the end of the phrase "or reasonably appear to be unlikely to succeed if tried" clearly indicate that each of the three phrases in the subsection are to be construed alternatively. Thus, there are three permisible findings: (1) normal investigative procedures have been tried and have failed; (2) normal investigative procedures reasonably appear to be unlikely to succeed if tried; or (3) normal investigative procedures [appear] to be too dangerous. Judge Kennedy here found the second. The orders and applications are sufficient on their face and, therefore, withstand the exclusionary rule of § 2518(10)(a)(ii).

* * *

The other arguments presented by defendants were adequately discussed in the June 16, 1972 opinion and are without merit. Finally, since no allegations of facts contrary to those in the two original applications and supporting affidavits sworn to before Judge Kennedy have been made by defendants, no evidentiary hearing on the validity of the allegations made therein is appropriate.

Defendants' Motion for Rehearing on the Motion to Suppress Wiretap Evidence is, therefore, DENIED.

IT IS SO ORDERED.

/s/ Philip Pratt
PHILIP PRATT
United States District Judge

/s/ John Feikens
JOHN FEIKENS
United States District Judge

Dated: June 5, 1973.

EXCERPT OF
MEMORANDUM OPINION AND ORDER
CONCERNING TRIAL ISSUES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, CRIMINAL NO. 46597

vs.

EDDIE JACKSON, et al.,

Defendants.

_____/

UNITED STATES OF AMERICA,

Plaintiff, CRIMINAL NO. 46598

vs.

WILLIE LEE KILPATRICK, et al.,

Defendants.

_____/

MEMORANDUM OPINION AND ORDER

These cases are currently before the Court for decision after a bench trial.

In this memorandum the legal issues which arose during and after trial will be discussed. Before proceeding to a discussion of those issues, however, a brief factual summary of these cases and the trial should be helpful.

* * *

I. Wire Interceptions

Throughout these proceedings defendants have challenged the lawfulness of wire interceptions made under the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S. C. § 2511 et seq.). Defendants now raise three additional arguments in seeking to suppress all evidence derived from these interceptions.

* * *

B.

Defendants further contend that the evidence produced at trial clearly indicated that electronic surveillance was not necessary in this case and that normal investigative procedures would have been satisfactory. This argument is founded upon 18 U.S.C. § 2518(3) which requires a showing that normal investigative procedures are inadequate before wire interception methods may be utilized.

At trial one of the defendants in Number 46598, Roosevelt Nabors, testified for the government. Defendants assert that Nabors could have infiltrated the organization allegedly formed by defendant Jackson and that a wiretap on Jackson's telephone at 19315 Hubbell Street was unnecessary.

In the previous opinions, we fully discussed this issue and held that there had been a sufficient showing in each application and supporting affidavit submitted to Judge Kennedy to support her finding that normal investigative procedures would reasonably appear to be unlikely to succeed. Absent a showing that the averments relied upon by Judge Kennedy in making this determination were knowingly false or made in bad faith, her finding is necessarily conclusive.

Defendants contend, however, that Nabors had an opportunity to become a lieutenant in "the Jackson organization." While this may well be true, it does not substantially detract from the averments of Special Agent Ronald S. Garibotto in his affidavits submitted to Judge Kennedy in support of the two wiretap applications. Narcotics distribution operations are extremely complex. Thus it would be unlikely that Nabors could learn the extent of the alleged conspiracy even if he could have, in fact, infiltrated the organization. Additionally, with his lengthy prior criminal record, Nabor's reliability, both during the investigation and as a witness at trial, was marginal at best.

In United States v. Pacheco, 489 F.2d 554 (1974), the Fifth Circuit, in a case similar to the case at bar, held that the availability of an informant is not sufficient to eliminate the need for a wiretap when the investigation involves a complex illicit operation.

> "In no realistic sense could it be said that Mrs. Matthews had information that would eliminate, or, in

> some instances, even lessen, the need for the Fox tap. Without the Fox tap, there would have been at least seven defendants who would not have appeared in the case at all, and the sole evidence as to several others would have been the uncorroborated testimony for an accomplice previously convicted of purjury[sic]. Finally, we note that the purpose of the requirement in section 2518(1)(c) is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the judge of the difficulties involved in the use of conventional techniques."
>
> 489 F.2d at 565.

See also United States v. Bleau, 363 F. Supp. 438, 441 (D. Md. 1973), and United States v. Staino, 358 F.Supp. 852, 856-7 (E.D. Pa. 1973).

More importantly, however, this Court cannot properly review the propriety of Judge Kennedy's findings in the two wire interception orders unless the averments made in the affidavits in support of the applications were in some way tainted. A wire interception order issued under 18 U.S.C. § 2518, like an ordinary search warrant, cannot normally be challenged if it is facially valid. Here the only additional fact offered is that an informant might have been able to infiltrate the so-called Jackson Organization. We do not believe this evidence is sufficient to permit a re-opening of Judge Kennedy's finding that normal investigative procedures appear to be unlikely to succeed.

* * *

A number of other issues were raised during the course of the trial by defense counsel.[14] Since, however, defendants have not presented any written arguments on these questions, they apparently do not wish to pursue them at this time. We have nevertheless considered each and believe them to be without merit.

JOHN FEIKENS
United States District Judge

PHILIP PRATT
United States District Judge

Dated: July _____, 1974.

Detroit, Michigan

14/ These issues include (1) dismissal after the government's opening statement; (2) the lawfulness of the arrest of defendants Kilpatrick, Reynolds and Riggs in New York; (3) demand for evidence seized from defendants Kilpatrick and Reynolds in New York, and (4) admissibility of evidence at trial relating to occurrence before the alleged beginning of the conspiracy.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. Criminal Action
No. 46597

EDDIE JACKSON, et al.,

Defendants.

FINDINGS AND CONCLUSIONS - RULE 23(c)

The decision required in Criminal Action No. 46597 is the innocence or guilt of the following defendants:

Eddie Jackson
Courtney Brown
George Blair
Herbert L. Bell
Ronald Garrett
Samuel Eugene Horne
Alphonzo Acgustus Jones
Charles S. Reynolds
Charles Rudolph
Fairh Lee Riggs
Charles Cavanaugh
Lamar Eaters
Laticia Burns
Maurice Thompson
Leo Hurt, Jr.

What follows here are findings and conclusions required by Rule 23(c) of the Federal Rules of Criminal Procedure.

While there are facts from which it may be concluded that there was an understanding on the part of some of the defendants prior to September 26, 1971, that date marks the beginning date of the charged conspiracy, and so that evidence ordinarily may not be used for the purpose of proving any of the essential elements of the conspiracy. It is considered, rather, by this court as pre-conspiracy foundational information. For example, on April 19, 1971 defendant Charles Rudolph drove from defendant Jackson's residence at 18666 Washburn in Detroit by means of a 1970 Cadillac registered to himself to a building at 274 East Hancock Street. Utilities in that building were registered in the name of defendant Jackson. During that day defendant Courtney Brown crossed Hancock Street in front of 274 East Hancock and spoke to defendant Jackson and Willie Lee Kilpatrick, an un-indicted co-conspirator.

On April 29, 1971 defendants Brown and Jackson and another entered 18666 Washburn, Detroit; and on that same day defendant Brown, operating a 1971 Cadillac registered to defendant Jackson, exited the Washburn address and went to a residence at 19488 Mark Twain.

On April 30, 1971 defendants Jackson, Brown, Rudolph and Garrett were together in a vehicle which was stopped for a traffic violation. On that same day defendants Ronald Garrett

and Courtney Brown exited 19488 Mark Twain and drove to the building aforesaid at 274 East Hancock, Detroit. While these defendants were there for approximately ten minutes, several unidentified individuals were seen walking around the west side of that structure. A logical inference is that they were in contact with these defendants. Defendants Brown and Garrett then left 274 East Hancock and drove to 18666 Washburn where they entered those premises and later defendants Brown and Garrett and another person returned to defendant Brown's residence at 19488 Mark Twain. Still later defendants Brown and Garrett left Brown's residence and returned to the address at 274 East Hancock, remained there for a short time and then proceeded from there to 18666 Washburn. Still later defendants Brown and Garrett exited defendant Jackson's address on Washburn and returned to defendant Brown's residence. Finally on that day, defendant Jackson left his residence and went to defendant Brown's residence on Mark Twain.

Thus, it is apparent that there was some concert of activity between these defendants at the times indicated and it is considered only for the limited purpose of analyzing the important events that then began to occur.

On October 22, 1971, while acting as an undercover agent, Claude Smith of B.N.D.D. went to 19315 Hubbell Street, was invited into the residence by defendant Blair and introduced to defendant

Jackson. At that time Smith purchased 151.03 grams of heroin from these defendants. Identified as present on that occasion in addition to these defendants were defendants Bell and Jones and co-conspirators Joseph and Reginald Weaver. While Smith was at the Hubbell Street address on the afternoon of October 22, he saw in the kitchen a quantity of white powdery substance. He was told that its quantity was an eighth and that it cost $4,200. He told defendant Jackson that he only had $4,000, to which Jackson replied; "Oh well, that's O.K. $200 is only cigarette money anyway. We'll take care of that later."

Surveillance during that day indicated that Roosevelt Nabors, who testified on behalf of the government and who was then ostensibly a part of the Jackson group, entered the Hubbell Street address with Agent Smith. It was shown that on the street in front of the house was a 1972 Cadillac registered to Ruth Ann Burt, the former wife of defendant Blair; a 1972 Cadillac registered to one Octiviner Jackson of 18666 Washburn, Detroit; and a 1971 Oldsmobile Toronado registered to defendant Herbert Bell.

On October 27, 1971 a 1972 Cadillac registered to Octiviner Jackson of 18666 Washburn was parked next to the Hubbell Street address and that vehicle later was observed at defendant Jackson's new residence at 17533 Westhampton, Southfield, Michigan, where on that day defendant Jackson was observed standing in his front yard.

On November 2, 1971 a 1972 Oldsmobile Toronado registered to defendant Bell was parked in front of the Hubbell Street address; a 1972 Cadillac registered to Ruth Ann Burt was also parked there as well as a Chevrolet Caprice registered in the name of Theresa Brown of 19488 Mark Twain. Later in that day defendant Jackson's Cadillac, registered to him under the address of 18666 Washburn, was seen with a 1972 Cadillac registered to Octiviner Jackson under the same address in the driveway of 17533 Westhampton, Southfield. On that day a black Toronado registered to defendant Bell left the vicinity of the Hubbell Street address where it had been parked.

On November 4, 1971 at 19315 Hubbell Street, Claude Smith, Special Agent, B.N.D.D. undercover, purchased 157.5 grams of heroin from defendants Jackson and Courtney Brown in the presence of defendant Alphonzo Jones and co-conspirators Joseph and Reginald Weaver. It was on that occasion that defendant Jackson told Smith: "I am trying to turn this stuff over", and that his old lady had been busted in New York and that it cost at least $25,000 to $30,000 to get her out of jail and that he was trying to get the stuff out as soon as possible. Defendant Jackson's "old lady" was a female friend, defendant Fairh Lee Riggs.

On September 26, 1971 she had travelled from Detroit to New York City accompanied by defendant Charles Reynolds and co-conspirator Kilpatrick. These individuals had procured one-way

reservations for cash and, accordingly, were required to identify themselves at the American Air Lines counter in Detroit prior to boarding the flight. Defendant Riggs was carrying a brown paper bag and since these individuals had difficulty identifying themselves, their carry-on luggage was examined. The examination extended to the brown paper bag; it contained money in large denominations approximating $30,000. Because of these peculiarities, the descriptions of the individuals were passed to the Michigan State Police and in turn to the port authority police at LaGuardia Airport in New York. Upon arriving at that airport defendants Riggs and Reynolds and co-conspirator Kilpatrick were placed under surveillance. They were allowed to leave the LaGuardia Airport vicinity. Later on that day defendant Riggs, upon returning to the airport, was arrested and in her carry-on luggage were found four plastic bags containing heroin of a net weight of 1,917.2 grams, as well as $4,804 in cash. Defendant Reynolds and co-conspirator Kilpatrick also returned to the airport where they were detained for further investigation. In response to a question as to whether or not they knew the defendant Riggs, both said they did not know her and then Kilpatrick stated, "We don't know Faith Lee", whereupon defendant Reynolds told Kilpatrick to "shut up". It was observed that defendant Reynolds had an airline ticket carrying names that were different for the return flight from New York to Detroit than that by which they flew to New York.

Ruth Ann Burt, the former wife of defendant George Blair, testified that defendants Blair and Jackson told her that defendant Fairh Lee Riggs had been arrested in New York City: "They told me Fairh Lee had been arrested in New York at the airport. They told me that they confiscated the heroin that she had on her. They also told me that it must have been a setup, because the other two fellows that were with her were not arrested or even charged with anything."

At the purchase on November 4 at Hubbell Street, defendant Jackson was seated at the table. In front of him was a large plastic bag containing a white powdery substance approximately three pounds in weight. Special Agent Smith asked as to the price of an eighth kilogram of heroin and defendant Brown stated it would be $4,200. Smith placed $4,200 on the table and defendant Brown, having picked up the money, went to a lower cupboard in the kitchen and obtained another bag which was of the same size as the one on the table. It contained a white powdery substance. Together then defendants Brown and Jackson meted out a required amount.

In corroboration of the events of November 4, it was shown that defendant Jackson had left his residence in Southfield and had entered and remained at the Hubbell Street address on at least three occasions on that day and that defendants Courtney Brown and George Blair were also at those premises. Surveillance

likewise established that Special Agent Smith and Roosevelt Nabors had also been at the Hubbell Street address during that day.

Nabors testified that shortly after this November 4 buy, he was invited to the Hubbell Street address through co-conspirator Joseph Weaver, at which time defendant Jackson delivered to Nabors three quarters of an amount of heroin on consignment. Nabors said that at that meeting there were present defendants Jackson, Blair and Brown as well as co-conspirators Joseph Weaver and Kilpatrick.

On November 15, 1971 a telephone call was made to Apartment 11, 1930 Ewald Circle, by defendants Blair and Jackson to defendant Hurt. As a result of this telephone conversation heroin described as being in the amount of 24 quarters and cocaine in the amount of 10 quarters was delivered to the Ewald Circle address, and specifically to defendant Hurt. This delivery was made by defendant Blair assisted by Ruth Ann Burt. She testified that in early December, when Leo Hurt had changed his residence to Cherrylawn Street, she with Blair delivered 8 kilograms of heroin from the Hubbell Street address to that new residence.

On November 20 co-conspirator Joseph Weaver telephoned defendant Jackson at the Crown Motel to advise him that defendant Blair was in the process of making a deal with regard to 60 quarters with one Milwaukee Jack. The term "quarter" is commonly a norm of reference to a narcotic. Apparently, there are 5 quarters to

a narcotic ounce. Sixty quarters is the equivalent of approximately a quarter kilogram of narcotic (Government Exhibit 11-A-24; T-7/10/73, p.4).

On November 21 defendant Jackson telephoned defendant Hurt at the Ewald Circle apartment with regard to a delivery that was then being made and the payment for it. This was one of several telephone calls that were made by defendant Jackson to defendant Hurt indicating high activity. The after-effects of this activity in the collecting and in the stashing of the proceeds was evident in telephone calls monitored on November 22 and 23, 1971. Again, on November 24 in a phone call from defendant Jackson to defendant Cavanaugh, further dealing is alluded to, this primarily with regard to cocaine.

In December the activity continued. Defendants Jackson and Horne on December 9 discussed a deal involving a distribution to a purchaser who did not want his identity known. The conversation bore this out (Tape 67, Call 11, Government Exhibit 11-A-90):

Jackson: "What's the problem.

Horne: High society. Don't want to be known. I'll arrange a meeting place. We could go there.

Jackson: We don't want to be known no worse than he don't want to be known . . . ."

At this point Horne offered to take the product saying to Jackson

that he would not "have to gallop around the street". Jackson said:

> "You can't take it away without no money. We haven't seen anything. This running and taking something. We ain't seen nothing, Gene. He's gonna have to get out on the street with you and we don't know who he is and he don't know who we is, you understand. Meet just the two of us you understand, where we meet together, you understand. Then we can do business. If not, you understand, we can't go on any espionage type of thing because it ain't this type of thing and if he want what he want he got to come out and get it."

The transaction to which reference was made in the telephone call was a "full thing", a term used to refer to a kilogram quantity of a narcotic.

On December 14 defendant Blair telephoned defendant Jackson to discuss a delivery that he had made to a customer of Milwaukee Jack's, a man by the name of Slats. Jackson told Blair on the 14th that the moon was ready to "jump over the mountain", an obvious reference to an upcoming, good-sized delivery. Jackson said: "And what I'm telling you, you understand, ain't far off you understand . . . . What I'm telling you is definite."* The telephone call referred to was made by Blair to Jackson at Jackson's residence at 17533 Westhampton in Southfield. On that same day, December 14, defendant Jackson advised defendant Blair that no credit was to be given to de-

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* Tape 79, Call 40, Government Exhibit 11-A-132.

fendant Cavanaugh and that the price was $225 a quarter; that if Cavanaugh wanted 13 quarters he could have it at $200 a quarter.

On December 15 at 8:22 p.m. there was a telephone call between defendant Jackson and one Duane Adams (Tape 83, Call 22, Government Exhibit 11-A-147). This conversation definitely shows the movement of quantities of narcotics during the evening hours of December 15. This was also revealed by a telephone call (Government Exhibit 11-A-150) on the same evening in which defendants Jackson and Alphonso Finch conferred. Jackson says:

> "The gypsy load just came in. I've been dying to talk to you . . . . Come over . . . . Come on over Hubbell in an hour."

Still later that evening in a telephone conversation (Tape 83, Conversation 36, Government Exhibit 11-A-153) defendants Jackson and Herbert Bell spoke about quantities and deliveries.

At approximately 10 p.m. the arresting officers moved in at the Hubbell Street address. Defendant Leo Hurt was arrested as he was leaving the house. Retrieved from the floor of the front seat of his Oldsmobile was a sample quantity of heroin and $1,107 from his person. Defendant Alphonzo Jones was arrested while leaving the Hubbell Street address. He was carrying 1,924.5 grams of heroin. Another individual, Cara Woods, Jr., was arrested likewise while exiting. On his person were found 137.35 grams of heroin, $4,809 in cash and a loaded automatic pistol. Defendants Jackson, Brown and Blair as well as co-conspirators Reginald and Joseph Weaver were arrested inside the house. Seized by

means of appropriate warrants were 659.66 grams of cocaine, 1,041.66 grams of methapyrilene hydrochloride (an adulterant for heroin), 45.3 grams of cocaine, 14.66 grams of cocaine, 2,589.93 grams of heroin, 4,111.31 grams of lactose in 18 plastic bag containers, 71 bottles of 72 capsules each of methapyrilene hydrochloride and various other narcotics paraphernalia. On the same date there were other seizures.

In Kilpatrick's address book, which was seized from the premises of 7360 Dexter, Detroit, were found the telephone numbers of defendant Jackson. In defendant Charles Rudolph's address book, which was seized at his residence at 9074 Prairie, were found the names and telephone numbers of defendants Blair, Bell, Ronald Garrett, Jackson and Fairh Lee Riggs.

In an address-telephone book of one Elizabeth Thomas, seized at the premises known as 18666 Washburn, thenames and telephone numbers of defendants Alphonso Finch, Sam Horne, Courtney Brown and Eddie Jackson appeared.

Ruth Ann Burt testified that defendant George Blair began to work with Jackson in mid-October, 1971. She said she was present with defendants Jackson and Blair when Jackson discussed defendant Riggs' arrest in New York. She testified that defendants Brown, Blair and Jackson returned to Detroit from a trip to New York with six bags of narcotics and other paraphernalia; that it

was on this occasion that the defendants openly discussed the methods of mixture of cocaine and other drugs for salesbility and Ruth Ann was instructed by defendant Jackson on how to cook lactose.

The Hubbell Street address clearly was the physical headquarters of the conspiracy. It dominates as the place where most of the action took place. It was the gathering point for the participants in the conspiracy. It was the place where the defendants "cut" the narcotics. It was the place from which drugs were distributed. It contained much narcotics paraphernalia. It was obviously a convenient place for defendant Jackson for he could disassociate much of his drug activity away from his residence in Southfield.

Defendant Jackson was the top man in the organization and under him were defendants Blair, Courtney Brown and Herbert Bell. Defendant Fairh Lee Riggs* was used as an important courier in the transportation of narcotics. That she was an intimate associate of defendant Jackson is undoubted. On December 14 Jackson told Blair to "call me back over here at Fairh Lee's". Defendants Ronald Garrett, Samuel Horne, Alphonzo Jones, Charles Rudolph and Charles Cavanaugh were active associates, their

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* By stipulation the record in the case of United States v. Fairh Riggs, United States District Court for the Eastern District of New York, No. 71-CR1047, was incorporated into the proceedings of this case.

principal tasks being the receipt, make-up and distribution of narcotics for the Jackson group. Quantities of drugs sold by the organization were in kilograms, half kilograms, fourths, eighths and ounces; and the prices charged for these quantities were as follows: a quarter of an ounce sold for $175 to $225, an ounce sold for $800 to $1,200, an eighth of a kilogram sold for $3,500 to $4,200, a half kilogram sold for $15,000 to $18,000 and a kilogram sold for $25,000 to $30,000.

It is clear beyond a reasonable doubt that a conspiracy existed and that these named defendants knowingly and intentionally joined in the conspiracy to manufacture and distribute and to possess with intent to distribute quantities of heroin and cocaine in violation of Section 841(a)(1), Title 21, United States Code. It is equally clear that this conspiracy functioned under the leadership of defendants Jackson and Brown. As a matter of fact, they were referred to by their associates as "President and Vice President", respectively. Narcotics were purchased from sources outside of Michigan, prepared for sale, mainly at the Hubbell Street address, and distributed to ultimate customers through wholesalers who were lieutenants in the organization. The record amply demonstrates that contact between members of the organization was most frequently made by telephone and delivery of narcotics was most often completed by pick-ups arranged at agreed upon locations. The record also

demonstrates the large amounts of narcotics which the organization distributed and the huge amounts of money that were involved.

All of the evidence in this period beginning in September of 1971 builds almost irresistibly to the date of December 15, 1971. It is apparent that a large stock of narcotics had been arranged for and was expected to be received by the organization on that date. The frequency of telephone calls leading up to December 15 and the anxious content of the telephone calls demonstrate this build-up to the climax that occurred when, as distribution was about to commence, at about 10 p.m. on that date, agents and other law enforcement personnel made numerous arrests and executed search warrants on the personnel of the organization and their places of activity. Not only is the court satisfied that the conspiracy charged existed, but that defendants Eddie Jackson, Courtney Brown, George Blair, Herbert Bell, Fairh Lee Riggs, Ronald Garrett, Samuel Horne, Alphonzo Jones, Charles Rudolph and Charles Cavanaugh knowingly and intentionally joined the conspiracy, and the overt acts listed in Count One of the indictment were committed by the defendants and co-conspirators there listed.

Heretofore the court has made salient findings as to the conspiratorial arrangement and the participation in it of defendants Jackson, Brown, Blair, Bell and Riggs.

What follows are the court's findings as to the joinder of the other defendants hereinbefore named into this conspiracy and their participation in it.

It is clear beyond a reasonable doubt that defendant Ronald Garrett knowingly and intentionally joined the conspiracy. Garrett, also known as "Five O", was, as has been pointed out, associated with Jackson and Brown early in the year of 1971. His telephone number was listed in Kilpatrick's address book, in defendant Rudolph's telephone-address book as well as the address and telephone books of other defendants, and it was evident that he had a substantial account with the organization according to defendant Rudolph's account records. He figures prominently in a number of telephone conversations. For example, on November 20, 1971 defendant Jackson told co-conspirator Joseph Weaver to tell George (presumably Blair) to call Garrett. From that call it appears that Garrett was an individual of some prominence in the organization. Other phone calls also bear this out. Defendant Brown, in a telephone call on November 26, speaks directly to Garrett's heavy involvement. Defendant Garrett received a kilogram of heroin on one occasion and 35 quarters on another occasion for distribution.

It is clear beyond a reasonable doubt that defendant Samuel Horne knowingly and intentionally joined the conspiracy. Horne, also known as the "barbershop man", was regularly involved in contacts with the leaders of the conspiracy from September to December. From telephone conferences that Horne had with co-conspirator Joseph Weaver, defendant Courtney Brown, defendant Blair, defendant Bell and defendant Jackson, it is readily

apparent that Horne was very active in the wholesale distribution of narcotics. This was his principal activity for the group. Horne's involvement with defendant Jackson is revealed in an earlier-mentioned phone conversation when, on December 9, Horne speaks of a $15,000 deal.

It is clear beyond a reasonable doubt that defendant Alphonzo Jones knowingly and intentionally joined the conspiracy. Jones was present at the undercover buys at Hubbell Street on October 22 and November 4. He was involved principally in the distribution end of the organization. It was Jones who helped defendant Fairh Riggs arrange a bond in connection with her case in the Eastern District of New York, resulting from her violation of law in September of 1971. Jones did not figure prominently in intercepted telephone calls largely because he occupied a place close to the throne and thus he did not have to telephone frequently. Interestingly, there is only one call in which he was directly involved and it contained the preemptory command from Joseph Weaver: "Courtney wants to see you."

It is clear beyond a reasonable doubt that defendant Charles Rudolph knowingly and intentionally joined the conspiracy. As was earlier stated, Rudolph was in the company of the leaders of the group, Jackson and Brown, in the spring of 1971. Ruth Ann Burt testified that defendant Blair told her that defendant

Rudolph was one of the lieutenants in the organization. Even though there had been some personal difficulty between Rudolph and Jackson, Rudolph nonetheless continued to obtain heroin from Jackson. Rudolph, also referred to as "Great Dolph", appeared through his telephone calls to be deeply involved in wholesale distribution of drugs for the group. He appears prominently in co-defendant telephone and address books and his account records, seized pursuant to a search warrant of his premises at 9074 Prairie, revealed the large financial amounts that were involved. It was Rudolph who had seven telephone automatic dialing cards containing the names and telephone numbers of some of the defendants.

It is clear beyond a reasonable doubt that defendant Charles Cavanaugh knowingly and intentionally joined the conspiracy. Cavanaugh was one of the wholesale distributors of the organization. Phone calls reveal that. Additionally, he engaged in other kinds of supply activity for the group. For example, in December of 1971 Ruth Ann Burt and defendant Blair exchanged an ounce of cocaine with Cavanaugh for three outfits of clothing. More important, the telephone conversations during the period show that defendant Cavanaugh actively associated with the leaders of the organization and that he spoke frequently to defendants Jackson, Courtney Brown and co-conspirator Joseph Weaver regarding distribution. Toward

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* Tape 83, Call 30, Government Exhibit 11-A-151.

the end of the period it appears that he had a falling out with defendant Jackson and he was not permitted to obtain narcotics on credit for distribution, although Jackson, on December 14 in a telephone call, offered him 13 quarters at $200 a quarter.

While the evidence as to defendant Hurt is not as overwhelming as in the above cases, the court nonetheless finds beyond a reasonable doubt that he knowingly and intentionally joined the conspiracy. The court has carefully considered the case of United States v. Bostic, 480 F.2d 965 (6th Cir. 1973) and the cases therein referred to. Of particular importance is Judge Hand's comment, alluded to in the opinion of my brother, Judge Philip Pratt. Judge Hand said that a participant in a conspiracy "must in some sense promote their venture himself, make it his own, have a stake in its outcome". It appears clear that this is what defendant Hurt did do. The quantities that he purchased obviously were for further wholesale distribution or for retail manufacture and distribution. The nature of his calls to the leaders of the conspiracy also demonstrates that he had a stake in the outcome of the conspiracy and that he was not interested simply in purchasing drugs as a customer. In a telephone call on November 20 with defendant Blair, defendant Hurt complains about the quality of the distribution and says: "It ain't right.

Everybody wanna bring it back." The next day, while talking by phone to defendant Jackson, Jackson says:

Jackson: "I just got the high sign . . . . Yeah, well I'm puttin' in all of mine, you understand, 'cuz I want to turn it as big as I can. Yeah send mine on over, Leo . . . .

Hurt: Okay.

Jackson: Alright, big George will be over there. Don't even worry about it.

Hurt: I got about 25.

Jackson: What, what you got?

Hurt: 25." (Tape 20, Call 10, Government Exhibit 11-A-33).

Then follows a discussion of money in which Jackson points out that Hurt first gave him 7 then 75 and then 15 and then Hurt said he gave Jackson one additional one. Jackson then says: "Leo, listen. I gotta call some other people. I'm fixin' to get out. Jus' get it together for me." Leo Hurt is also prominently mentioned in co-defendant telephone and address books and, of convincing importance, he was in the Hubbell Street house on the night of December 15 when the big distributions were made. At that time, he was arrested with a sample quantity of heroin found below the driver's seat of his automobile as well as $1,107 in cash.

With regard to defendants Maurice Thompson, Leticia Burns and Lamar Esters, the court cannot say beyond a reasonable doubt that these individuals knowingly and intentionally joined the conspiracy. To echo the language of my brother, Judge

Philip Pratt, the evidence against these defendants does not establish that kind nor that extent of involvement under the case law which satisfies this court that these defendants entered into an agreement with members of the Jackson organization "to promote their venture, make it their own or have a stake in the outcome". It appears that defendants Thompson, Burns and Esters were customers of some of the wholesale distributors in the organization and nothing more. While the line is close, this court concludes that these defendants are not guilty of the charges in Count One in the indictment.

As to the defendant Lamar Esters, it seems that at best he was a customer of the defendant Cavanaugh's. The phone conversations which were intercepted relating to Esters have him in discussion with Cavanaugh only. On December 10, 1971 the conversation concerns the amount of money Esters has available to purchase drugs from Cavanaugh. This was also the situation in the phone call of December 14. Accordingly, the court is not convinced beyond a reasonable doubt that defendant Esters knowingly and intentionally joined the conspiracy and hence he must be acquitted.

There remains for consideration the guilt or innocence of defendant Charles Reynolds under Count One. Reynolds went with defendant Riggs and co-conspirator Kilpatrick to New York on September 26, 1971. He, it appears, did nothing more than act

as a protective agent and guard for her. Unlike co-conspirator Kilpatrick who was early involved with defendants Jackson and Brown, and who was active at the Hubbell Street address as a lieutenant according to the testimony of Roosevelt Nabors, Reynolds was only involved in the New York trip. While his name and phone number appear in Kilpatrick's address book, he was not engaged in any other activity. It does not appear to this court that he made the conspiracy his own venture or that he had a stake in its outcome. It does appear that he was picked up in the "dragnet of conspiracy" referred to by Judge Hand in United States v. Falcone, 109 F.2d 579 (2d Cir. 1940). Accordingly, defendant Reynolds must be acquitted.

The court must also determine the guilt or innocence of the defendants other than Esters and Reynolds on the substantive counts in this indictment. There are 15 such substantive counts charging violations of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. These counts charge various acts of distribution and possession with intent to distribute narcotics and set forth three verdict possibilities: that the defendants may be guilty as conspirators to commit these substantive offenses, or as principals or as aiders and abettors. Since the court has found that defendants Jackson, Brown, Blair, Bell, Riggs, Garrett, Horne, Jones, Rudolph, Cavanugh and Hurt are guilty of the charges contained in Count One of the indictment in that they are co-

conspirators, the application of the Pinkerton rule compels a finding of their guilt as to the substantive offense counts in the indictment found to be the acts of the co-conspirators in furtherance of the conspiracy. Counts Two and Five are not found by this court to be in furtherance of the conspiracy, but Counts Three, Four, Six, Seven, Eight, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, Fifteen and Sixteen all involve distribution and possession with intent to distribute narcotics in furtherance of the conspiracy. Thus, the court finds that defendants Jackson, Brown, Blair, Bell, Riggs, Garrett, Horne, Jones, Rudolph, Cavanaugh and Hurt are guilty of the substantive offenses charged in these counts.

Earlier this court found that defendants Thompson and Burns did not join the conspiracy. The court does find, however, beyond a reasonable doubt that defendants Thompson and Burns are guilty as principals of the substantive offenses charged in Counts Two and Five of the indictment. On October 18, 1971 Special Agent Smith, acting undercover, purchased 21.79 grams of heroin from these defendants. On November 8, 1971 these defendants sold 21.785 grams of heroin to Special Agent Smith. These sales occurred on the dates mentioned at 5841 Maxwell Street in Detroit.

It is clear beyond a reasonable doubt that defendants Jackson, Brown, Blair, Bell and Jones are likewise guilty as principals of the commission of the substantive offense charged in Count Three of the indictment, in that on October 22, 1971 they sold 151.03 grams of heroin to Special Agent Smith, acting in an undercover capacity. Likewise, it is clear that defendants Jackson, Brown, Horne and Jones are guilty as principals of the substantive offense charged in Count Four of the indictment in that on November 4, 1971 they sold 157.15 grams of heroin to Special Agent Smith, acting in an undercover capacity. It is equally clear beyond a reasonable doubt that defendant Jones is guilty as a principal of the substantive offense charged in Count Six in that on December 15, 1971 he was engaged in the distribution of 1,924.5 grams of heroin when he was arrested while exiting the Hubbell Street address and he is likewise guilty of the substantive offense charged in Count Ten of the indictment as a principal since on that date he possessed with intent to distribute 1,924.5 grams of heroin.

It is likewise clear that defendant Hurt is guilty of the substantive offense charged in Count Seven of the indictment as a principal since he was engaged in the distribution of a sample quantity of .268 grams of heroin when he was arrested

after exiting the Hubbell Street address on December 15, 1971 and that likewise he is guilty of the substantive offense charged in Count Eleven of the indictment in that he possessed with intent to distribute it .268 grams of heroin as charged.

Finally, it is clear that defendants Jackson, Brown and Blair are guilty as principals of the substantive offenses charged in Counts Thirteen, Fourteen, Fifteen and Sixteen of the indictment in that on December 15, 1971 they possessed at the Hubbell Street address with intent to distribute it: 659.66 grams of cocaine (Count Twelve), 681.8 grams of heroin (Count Thirteen), 45.3 grams of cocaine (Count Fourteen), 14.66 grams of cocaine (Count Fifteen) and 2,589.93 grams of heroin (Count Sixteen).

In summary then, defendants Jackson, Brown, Blair, Bell, Riggs, Garrett, Horne, Jones, Rudolph, Cavanaugh and Hurt are guilty of the offenses charged in Counts One, Three, Four, Six, Seven, Eight, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, Fifteen and Sixteen of the indictment. Defendants Thompson and Burns are guilty of the offenses charged in Counts Two and Five

of the indictment. Defendants Reynolds and Esters are found not guilty.

Judgments on these findings will be enrolled.

John Feikens

JOHN FEIKENS
UNITED STATES DISTRICT JUDGE

DATED: Detroit, Michigan
July 31, 1974

AFFIDAVIT OF RONALD S. GARIBOTTO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS	)	No. A-11-11-71 CK

AFFIDAVIT

IN SUPPORT OF APPLICATION

Ronald S. Garibotto, being duly sworn, states:

1. I am a Special Agent of the Federal Bureau of Narcotics and Dangerous Drugs, United States Department of Justice. I have been so employed for two and one-half years (2 1/2) and have been assigned to the Federal Bureau of Narcotics and Dangerous Drugs, Regional Office, Region VI, Detroit Michigan for two years. I am an "investigator or law enforcement officer.....of the United States" within the meaning of Section 2510(7) of Title 16, United States Code - that is, an officer of the United States who is empowered by law to conduct investigations of and to make arrests for the offenses enumerated in Section 2516 of Title 18, United States Code.

2. This Affidavit seeks authorization to intercept wire communications for a twenty (20) day period concerning offenses involving violations of 21 U.S. C. 841(a)(1), 843(b), 844(a) and 846, which have been and are being committed by Eddie JACKSON, George BLAIR and others as yet unknown.

3. I have participated in the conduct of investigation of the offenses of Eddie JACKSON and George BLAIR. As a result of my personal participation in these investigations, of my knowledge of reports made to me by other Special Agents of the Federal Bureau of Narcotics and Dangerous Drugs and by officers and officials to the Detroit Police Department, in this matter and of my personal knowledge of the circumstances of these offenses involving the violations described in paragraph 2 above, I allege facts contained in the following numbered paragraphs to show that:

(a) there is probable cause to believe that Eddie JACKSON, George BLAIR and others as yet unknown have committed and are committing violations of Title 21, United States Code, Sections 841(a)(I), involving the knowing or intentional manufacture or distribution or the possession with intent to manufacture or distribute a controlled substance; 843(b), involving the knowing or intentional use of any communications facility in committing or in causing or facilitating the commission of violations of Sections 841(a)(I), 844 (a) and 846 of Title 21, United States Code; 844(a) involving unlawful possession of a controlled substance; and 846

involving a conspiracy to violate Sections 841(a)(I), 843(b) and 844(a) of Title 21, United States Code.

(b) there is probably cause to believe that telephone communications concerning the above-described offenses will be obtained through the interception of wire communications, authorization for which is herein applied. In particular, these wire communications to be intercepted will concern the dates, times, places, schemes and manners for selling, buying, possessing, concealing, delivering, distributing or paying for controlled substances when Eddie JACKSON and George BLAIR communicate with their co-conspirators, aiders and abetters, and their places of operation.

(c) normal investigative procedures reasonably appear to be unlikely to succeed.

(d) there is probable cause to believe that the telephone utilized by Eddie JACKSON and George BLAIR, located in the premises at 19315 Hubbell, Detroit, Michigan and carrying telephone number 313-864-4854 has been, is being and is about to be used by Eddie JACKSON, George BLAIR and others as yet unknown in connection with the commission of the above-described offenses.

4. Congressional findings and declarations to Title 11, Section 101 of Public Law 91-513, 84 Stat. 1242, 21 U.S. C. 801, the "Controlled Substance Act" of the Comprehensive Drug Abuse Prevention and Control Act of 1970 include subsections (2) through (7). These excerpted findings

are set out in full in paragraph number four of the Application and are incorporated by reference herein.

5. Based on my experience in criminal investigations concerning illegal controlled substances trade and the experience of other Special Agents in investigations concerning illegal controlled substance transactions, it has been determined that an illegal controlled substances manufacturer or distributor requires the use of a telephone facility to negotiate times, places, schemes and manners for selling, buying, possessing, concealing, delivering, distributing, or paying for controlled substances.

6. A confidential informant of the Bureau of Narcotics and Dangerous Drugs hereinafter identified as S-1, has provided consistently reliable and valuable information in the past six months which has been corroborated by independent investigation and through other sources of information. Information from S-1 has been the basis for eight separate investigations completed except for arrest and aprehension [sic] involving 15 large-scale narcotic defendants.

7. On October 22, 1971 S-1 placed a telephone call to telephone number 313-864-4854 in the presence of Bureau of Narcotics and Dangerous Drugs Special Agents Claude Smith and Richard Waber consenting to the Agents overhearing S-1's conversation with George BLAIR or Eddie JACKSON. The consensual overhearing was recorded and a portion of the transcript of that recording is as follows:

BLAIR: Hello.

S-1: How ya doin'?

BLAIR: Alright.

S-1: Did ya make it yet?

BLAIR: Huh?

S-1: Did ya make it yet?

BLAIR: Yeah, this is George.

S-1: What's happenin'?

BLAIR: Nothin' too much.

S-1: Hey, man, you the doctor.

BLAIR: Yeah, I been by your house, man.

S-1: My woman told me you was by, I was over by my man's, you know?

BLAIR: Yeah.

S-1: And a, we gettin' together on that thing.

BLAIR: Uh, huh.

S-1: So, listen, we got everything together, that thing, you know.

BLAIR: Oh.

S-1: For that 30?

BLAIR: Yeah.

S-1: That eighth.

BLAIR: Uh huh.

S-1: Uh huh, well, look here, now, what I'm gonna do, I'm gonna get right on in and get right on out.

BLAIR: Uh huh.

S-1: You know what I mean?

BLAIR: Uh huh.

S-1: Like, a lotta time been sayin', you know, they gonna take me out there, you know, to meet the man, you know?

BLAIR: Uh huh.

S-1: Tell me wait around the corner,

BLAIR: Uh huh, no (IA) I'll bring him here. I don't know whether he'll be here, you know, when (IA) Bubba, you know, they went someplace. But you can come here, you understand, and I'll tell you where he be at and everything.

S-1: Well, dig this, see what I'm talkin' about, George, well,

I'm gonna get you that, take you to the man then wait here, they go around the corner and they have the stuff when they get out there, you know, a, just be a lot of bull shit like they coppin' from that guy, they already had it when they go out there and while they around the corner, they go on in and bull shit around and come right back with some bull shit.

BLAIR: Uh huh.

S-1: And then there won't be nothin' and then I can't,

BLAIR: Hey a, where you at, now, man?

S-1: I'm on, I'm over here on LaSalle.

BLAIR: La Salle?

S-1: Uh huh.

BLAIR: What's the number?

S-1: I have to find out the house number.

BLAIR: OK

S-1: OK?

BLAIR: OK

S-1: Hold on.

Short pause

BLAIR: No, I'm gonna come and pick you up.

S-1: You gonna come pick me up?

BLAIR: Yeah, that's what I'm gonna do, because you said you wanted to be here, didn't you?

S-1: Yeah, well, I tell you what, well, I tell you what you do.

BLAIR: Yeah.

S-1: Well, see, we driving, let's say, we can meet you somewhere, where you want us to meet you at?

BLAIR: A, hey a, (IA to background) 9,

S-1: Huh?

BLAIR: 19315

S-1: 19315. Lemme get a pencil, George.

BLAIR: OK

S-1: (IA to background) Hold on, we tryin' to get a pencil. You know, we been tryin' and

runnin' and he ain't got nothin', you know?

BLAIR: Uh huh.

S-1: I told my man, you know, I said I finally found my man, you know. We been, look here, George, we spend 75, you know.

BLAIR: Uh huh.

S-1: 24

BLAIR: A, we can't, you can't talk like that,

S-1: Yeah.

BLAIR: But a, you know, everything is guaranteed, my man.

S-1: Yeah.

BLAIR: You know, whatever I, you know I say, it's a guarantee, ain't no bull shit.

S-1: Well, that's 19,

BLAIR: 315.

S-1: 315.

BLAIR: Yeah.

S-1: 19315.

BLAIR: Uh huh.

S-1: What's the street?

BLAIR: A, Hubbell.

S-1: Hubbell?

BLAIR: Uh huh.

8. S-1 stated after the conversation that he talked to a man that he knew as George BLAIR to set up the purchase of one eighth kilogram of heroin, 30 quarters of heroin.

9. Following the conversation S-1 and Special Agent Smith drove to 19315 Hubbell, Detroit, Michigan. S-1 introduced Special Agent Smith to George BLAIR who introduced S-1 and Special Agent Smith to Eddie JACKSON. Eddie JACKSON pointed to a quantity of white powdery substance on the kitchen table which appeared to be one eighth kilogram and told Special Agent Smith "it's all yours." JACKSON also told Special Agent Smith that he preferred meeting with his customers to guarantee his "stuff", the one eighth kilogram would take 10 cuts and he would accept $4,000 for the heroin instead of his price of $4,200. While Special Agent Smith was there, he heard the telephone ring on numerous occasions which was answered by George BLAIR.

10. A chemical analysis was performed on the substance obtained from Eddie JACKSON by Lawrence O. Buer, Forensic Chemist, Bureau of Narcotics and Dangerous Drugs, Chicago, Illinois, which revealed the substance to be 29 percent heroin

hydrochloride with a total weight of 151.03 grams.

11. On November 4, 1971 S-1 placed a telephone call to 313-864-4854 and gave consent to Special Agent Smith and Special Agent Ronald Garibotto to over hear his conversation with George BLAIR or Eddie JACKSON. This conversation was recorded and a partial transcript of the conversation is as follows:

Unident. Male:	Hello.
S-1:	A, George please.
U/M:	A, he isn't here. He be in 'bout 15 minutes.
S-1:	Listen, is Jackson back yet?
JACKSON:	Hello.
S-1:	What do ya know?
JACKSON:	What's happenin'?
S-1:	I'm comin' to see ya.
JACKSON:	Yeah, well I been waitin' on ya a long time.
S-1:	(laugh) I'm on my way in a minute.
JACKSON:	Alright, come on with it.
S-1:	Yeah, OK.

JACKSON: Hey.

S-1: Huh?

JACKSON: Gemme some idea what, you know, you talkin' about.

S-1: About a eighth.

JACKSON: Yeah, alright.

S-1: I'll see ya in a minute.

JACKSON: OK.

12. Following the telephone conversation S-1 told Special Agent Smith and Special Agent Garibotto that he had just talked to Eddie JACKSON setting up a deal for one eighth kilogram of heroin. Special Agent Smith identified Eddie JACKSON's voice from Special Agent Smith's prior conversations with him.

13. Immediately after the telephone call, S-1 and Special Agent Smith drove to 19315 Hubbell, Detroit, Michigan and met with Eddie JACKSON and Courtney R. BROWN. Special Agent Smith observed Eddie JACKSON working a "sifter" as he was sifting the white powdery substance which appeared to be heroin. JACKSON then measured out one eighth kilogram of heroin which he took from what appeared to be a 3-pound clear plastic bag filled with what appeared to be heroin. Special Agent Smith paid Eddie JACKSON $4,200 for the heroin. While there, Special Agent Smith observed Courtney R. BROWN remove a similar bag of approximately

3 pounds of the white powdery substance which appeared to be heroin from a cabinet in the same house. JACKSON told Special Agent Smith that it was costing him $25,000 to get his "woman" out of jail in New York City. Special Agent Smith asked JACKSON how his business was and JACKSON replied, as he was sifting what appeared to be heroin, that "I'm just trying to turn the "stuff" over as fast as possible."

14. While in the house, Special Agent Smith heard the telephone ring numerous times which was answered by Courtney R. BROWN.

15. On September 27, 1971 Cynthia Joyce RIGGS was arrested in a New York City airport with approximately 2 kilograms of heroin in her possession. Miss Riggs' bond was attempted to be posted by Eddie JACKSON of 17533 Westhampton, Southfield, Michigan. Miss Riggs' was seen boarding an aircraft in Detroit with a destination of New York City on September 27, 1971 and was observed by an airlines official to have obtained her ticket by a companion who reached into a sack full of money to obtain the required air fare.

16. On November 4, 1971 Special Agent Smith performed the Marquis Reagent field test on the substance obtained on November 4, 1971 which reacted positively as heroin hydrochloride and contained a gross weight of 164.4 grams.

17. Special Agent Smith reviewed the taped duplicated copies of the original

taped wire interceptions before preparing these excerpts of the telephone conversations set out above and identified the voices of George BLAIR and Eddie JACKSON respectively from conversations with Eddie JACKSON and George BLAIR during the above-described distributions of narcotic drug controlled substances. Special Agent Smith related to me all of the foregoing facts and circumstances.

18. On November 5, 1971, a records check (pursuant to Special Grand Jury Subpoena) was made with Michigan Bell Telephone Company when it was determined that the telephone located at 19315 Hubbell, Detroit, Michigan telephone number 313-864-4854 was listed in the name of John G. THOMAS and was a non-published telephone listing.

19. Normal investigative procedures have not succeeded in establishing the full extent of the activities of Eddie JACKSON and George BLAIR relating to their purchase or sale of controlled substances, nor has Eddie JACKSON's and George BLAIR's source of supply been identified or established. Based on my knowledge and experience as a Special Agent of the Federal Bureau of Narcotics and Dangerous Drugs, and the experience of Supervisory Agents and other Special Agents of the Bureau of Narcotics and Dangerous Drugs, normal investigative procedures reasonably appear to be unlikely to succeed in establishing the identies of Eddie JACKSON's and George BLAIR's co-conspirators, aiders and abetters, their places of operation

for their transportation of controlled substances to the Detroit, Michigan area and for their manufacture and distribution of controlled substances within the Detroit, Michigan area, and their times, places, schemes, and manners for selling, buying, possessing, concealing, delivering, distributing, or paying for controlled substances. My experience and the experience of other Federal Agents has shown that narcotics (controlled substance) raids and searches have not, in the past, resulted in obtaining evidence of who the raided violator's co-conspirators, aiders and abetters were, and where their places of operation were to transport controlled substances into an area or manufacture or distribute controlled substances about an area. Experience has shown that controlled substance manufacturers and distributors do not keep records of their controlled substance actions. It is the experienced belief of Special Agents of Region VI that additional surveillances of JACKSON's and BLAIR's and his operation, if continued on a regular basis, will jeopardize the outcome of the investigation, and will do little to reveal the manufacture and distribution network. JACKSON and BLAIR are extremely surveillance conscious and have two men on duty outside 19315 Hubbell to spot surveillance units. Special Agent Smith has been unable to move any further vertically or horizontally in the JACKSON/BLAIR operation because of JACKSON's and BLAIR's extreme caution. S-1 does not personally know anymore facts concerning the JACKSON/BLAIR operation.

20. For the reasons set out hereinabove, all normal avenues of investigation are closed, and it is my belief that the only reasonable way to develop the necessary evidence to discover the other persons involved in the JACKSON/BLAIR manufacture and distribution of controlled substances network, and their locations and schemes of operation, is to intercept wire communications from the telephone utilized by Eddie JACKSON and George BLAIR located in the premises at 19315 Hubbell, Detroit, Michigan, and carrying telephone number 313-864-4854, which has been, is being, and is about to be used by Eddie JACKSON, George BLAIR and others as yet unknown, in connection with the commission of the above-described offenses.

21. No other application is known to have been made to any judge for authorization to intercept, or for approval of interception of wire or oral communications involving any of the same persons, facilities, or places specified herein.

22. Any expenses necessarily incurred pursuant to a court order under section 2518(4)(e) of Title 18, United States Code, relating to technical assistance rendered to the Government by a communications common carrier or other person will be processed by the Bureau of Narcotics and Dangerous Drugs for payment by the United States Government, unless the court should direct otherwise.

WHEREFORE, based on the facts related above, and my experience as a Special Agent of the Bureau of Narcotics and Dangerous Drugs, I believe, and have reason to believe that the probable cause allegations stated in paragraph 3 (a), (b), (c), and (d) have been sustained.

/s/ Ronald S. Garibotto
RONALD S. GARIBOTTO
Special Agent
Bureau of Narcotics
and Dangerous Drugs
U.S. Department of Justice

Subscribed and Sworn to Before me
this 11th Day of November
1971 at Detroit Michigan

/s/ Cornelia G. Kennedy
UNITED STATES DISTRICT JUDGE

Supreme Court, U. S.
FILED
MAY 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1360

EDDIE JACKSON, RONALD GARRETT, FAIRH LEE RIGGS, CHARLES RUDOLPH, and CHARLES CAVANAUGH,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

HENRY ROTHBLATT
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Attorney for Petitioners

JON G. ROTHBLATT
Of Counsel

May 23, 1977

(636)

IN THE

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TO THE UNITED STATES COURT OF APPEALS
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PETITIONERS' REPLY BRIEF

I.

THIS CASE RAISES IMPORTANT ISSUES CONCERNING 18 U.S.C. § 2518(1)(C)

Contrary to the government's statement (Brief In Opp. at 9), petitioners do not contend that the supporting affidavit of Agent Garibotto "rel[ied] completely on the agent's experience in other narcotics cases." We recognize that the affidavit also included some specific allegations.[1/] Our contention, however, is that these averments proved to be false and misleading, and that the affidavit omitted other critically important information (Pet. at 14-18). The government's wiretap application therefore failed to satisfy the "full and complete statement" requirement of 18 U.S.C. § 2518(1)(c) not because of facial insufficiency alone, but

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1/ We said that the relevant paragraphs of the affidavit "consist primarily of general statements about the agent's prior experience with narcotics conspiracies, and his conclusions regarding the likely course of the investigation." (Pet. at 25) (emphasis added).

because, in light of facts disclosed at trial and unknown to the issuing judge, it was false, misleading and incomplete (Pet. at 27-31). See United States v. Anderson, 542 F.2d 428, 436-437 (7th Cir. 1976) (dissenting opinion).[2/]

United States v. Pacheco, 489 F.2d 554 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975), cited by the court below (Pet. App. 26a) and by the government (Brief In Opp. at 10), is inapposite. For in that case the wiretap was obtained by state officials who were unaware that the informant in question was cooperating with the federal government. Id. at 565. Here it is undisputed that Agent Garibotto, the affiant, was aware of the information withheld from the government's application.

2/ The court of appeals apparently assumed, sub silentio, that the Garibotto affidavit could be impeached under these circumstances (Pet. App. 26a). However, the district court held, as the "more important" reason for denying the suppression motion, that the facts disclosed by the government's informant at trial were insufficient to re-open the findings of the issuing judge (Pet. App. 61a). We believe this issue--whether or not the averments in the supporting affidavit could be impeached--is itself an important question suitable for review by this Court. Cf. North Carolina v. Wrenn, 417 U.S. 973 (1974) (dissenting opinion of Mr. Justice White from denial of certiorari).

United States v. Vento, 553 F.2d 838 (3rd Cir. 1976), also cited by the government (Brief In Opp. at 10), actually supports our position. There the court stated that while it is sufficient for the government to show that other investigatory techniques are impractical and unreasonable to pursue, "[t]he government must . . . fully explain to the authorizing judge the basis for such a conclusion." Id. at 849. Such an explanation (with regard to the unique opportunity that was presented for further infiltration by the government's informant) is precisely what was omitted here (Pet. at 28-30).

The government argues that United States v. Kalustian, 529 F.2d 585 (9th Cir. 1975), is distinguishable from this case because the Garibotto affidavit contained some specific allegations in addition to general statements of the agent's past experience in narcotics cases (Brief In Opp. at 9 n.11). While Kalustian was primarily concerned with facial insufficiency, we note that when the affidavit in this case is striken of its false and misleading averments,

is not significantly different from the affidavit in Kalustian. And the rationale of the Kalustian decision is certainly applicable here.[3/]

II.

IN FAILING TO REQUIRE SUPPRESSION WHERE A WIRETAP ORDER WAS INSUFFICIENT ON ITS FACE, THE COURT BELOW HAS MISCONSTRUED AND RENDERED MEANINGLESS 18 U.S.C. § 2518(10)(a)(ii).

Our argument with regard to the facial insufficiency of the wiretap order (Pet. at 31-38) has been somewhat confused in the government's consolidated opposing brief (Brief In Opp. at 7-8).

3/ While we do believe that § 2518(1)(c) has frequently been interpreted incorrectly (Pet. at 26-27), we disagree with the government's statement that Kalustian is inconsistent with other Ninth Circuit decisions, and that the Ninth Circuit has yet to resolve a proper standard for assessing compliance with § 2518(1)(c). (Brief In Opp. at 9 n.11). For in its most recent decision involving this question, a different Ninth Circuit panel applied Kalustian and again held a wiretap application insufficient. United States v. Spagnuolo, 549 F.2d 705 (9th Cir. 1977). Moreover, Kalustian has not been expressly rejected by any other circuit, and has been cited approvingly in at least one. United States v. Dimuro, 540 F.2d 503, 510-511 (1st Cir. 1976). Also see United States v. Curreri, 388 F.Supp. 607 (D.Md. 1974).

Petitioners' contention, simply stated, is that the order was "insufficient on its face" within the meaning of 18 U.S.C. 2518(10)(a)(ii) because it failed to correctly specify the identity of the authorizing official as required under § 2518(4)(d), and named instead an individual who, as a matter of law, lacked authority under § 2516(1) to approve the application. For the purpose of this argument, it is irrelevant that the application may actually have been approved by the Attorney General.

III.

THIS CASE SHOULD BE REMANDED FOR PROPER DETERMINATION OF PETITIONERS' LIABILITY UNDER THE SUBSTANTIVE COUNTS OF THE INDICTMENT.

Contrary to its position in the court below,[4/] the government apparently now concedes that under Pinkerton v. United States, 328 U.S. 640 (1946), a co-conspirator is liable only for

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4/ See Brief for United States at 73-74 n.47.

substantive offenses committed during the period of his membership in the conspiracy. But the government contends that the findings of the district court "clearly established" that each petitioner was part of the conspiracy before the date of the first substantive offense alleged in the indictment (Brief In Opp. at 12).

However, the district court misstated the law (Pet. at 21), and made no specific findings as to time of joinder or withdrawl from the conspiracy prior to finding each petitioner guilty of all the substantive offenses (Pet. App. 84a-85a).

CONCLUSION

For the foregoing reasons, and those set forth in the petition, a writ of certiorari should

issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Attorney for Petitioners

JON G. ROTHBLATT
Of Counsel

May 23, 1977

see

76

1314